



**Court of Magistrates (Malta)
As A Court of Criminal Judicature**

Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

The Police

-vs-

Dampha Tauman holder of Gambian Passport bearing number PC702656;

Kah Abdoulie holder of Italian Passport bearing number AV8025952;

Musa Bayo holder of Maltese Identity Card number 335791A

Case No.: 342/2023

Today the 2nd December, 2024

The Court

Having seen that the defendants **Dampha Tauman, Kah Abdoulie and Musa Bayo** were arraigned before this court for having:

1. On the 30th April, 2023, at a time between half past nine in the evening (21:30hrs) and half past eleven in the evening (23:30hrs) at 54, Triq Dun Gejtanu Mannarino, Birkirkara, without intent to kill or to put the life of Abdell Raouf Mohfoudi Ali Hassan in manifest jeopardy, caused harm of a grievous nature on the hands and face of Abdell Raouf Mohfoudi Ali Hassan as certified by Dott. Paula Malek MD Reg. No.4910 from Mater Dei Hospital and/or any other doctor;
2. Moreover for having in the same place, date, time and circumstances, committed theft of a mobile and other objects, to the detriment of Antonia Zerafa and/or another person/s and/or other entities, which theft is aggravated by violence, place and time;

3. Moreover for having in the same place, date, time and circumstances, uttered insults or threats not otherwise provided for in this Code, or being provoked, carried his insult beyond the limit warranted by the provocation;
4. Moreover for having in the same place, date, time and circumstances, rendered themselves recidivist according to Articles 49 and 40 of Chapter 9 of the Laws of Malta with definitive sentences that cannot be altered (SIC)

The Prosecution requested that in case of guilt besides the punishment the said persons will be ordered to pay for all the expenses of experts, as stated in Article 533 of Chapter 9 of the Laws of Malta.

The court was requested, with the scope of ensuring the safety of Abdell Raouf Mohfoudi Ali Hassan or to ensure public order or for the scope of protecting the mentioned person/s and their families from harassment or behaviour which may cause fear of violence, to issue a protection order against the accused in accordance with Article 412C of Chapter 9 of the Laws of Malta.

Whereas this case was assigned to this Court as presided through the "Assignment of a Case" by His Honour The Chief Justice dated the 2nd February, 2024.

Whereas this Court, as presided, held its first sitting on the 20th February, 2024;

Having seen the note by the Attorney General indicating the Articles of Law in terms of Article 370(3)(a) of the Criminal Code, Chapter 9 of the Laws of Malta dated the 27th September 2024, namely:¹

1. Articles 214, 215 and 216 of the Criminal Code, Chapter 9 of the Laws of Malta;
2. Articles 261(a)(e)(f), 262(1)(a)(2), 269(g), 270, 274(b), 277(a) and 281 of the Criminal Code, Chapter 9 of the Laws of Malta;
3. Articles 7, 339(1)(e)(2) and 341 of the Criminal Code, Chapter 9 of the Laws of Malta;
4. Articles 49 and 50 of the Criminal Code, Chapter 9 of the Laws of Malta;
5. Articles 382A, 383, 384, 385, 386 and 412C of the Criminal Code, Chapter 9 of the Laws of Malta;
6. Articles 17, 31, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta.

Having heard the accused declare that he does not object to the case being tried summarily by this Court;²

Having heard witnesses;

¹ Fol. 257-258

² Fol.260

Having seen all the acts and documents exhibited;

Having heard the prosecution and defence counsel make their final submissions;

Considers,

In his statement **Musa Bayo** declared that he used to see the injured party Abdel Raouf Mohfoudi Ali Hassan coming to the house he shared with other people, namely the co-accused and a certain Antonia, or Tania, and her daughter Miriam Elabed. Abdel used to frequent the two women. On the night of the 30th April 2023 he heard shouting coming from upstairs and went to see what was happening. It was there that he saw Kah Abdoulie arguing with Miriam and insisting she returns 20 Euros. Abdel was fighting with Kah and blocking the entrance of her room. After seeing that he was not managing to calm down Kah he left the house and only returned when the police arrived on scene.³

When interrogated, **Abdoulie Kah** told police that he had made plans to have sex with Elabed and when they met he sent her with two (2) ten (10) Euro notes to buy condoms. However, she did not meet him afterwards prompting him to call her whilst going to her room to demand that she returns the £20. A man answered the phone and after Kah told him he was at the door he opened. Kah demanded the money from Elabed but this man told him to leave. As Kah saw Miriam Elabed and her mother inside he proceeded to demand the money from them but Miriam told him she did not have the money. At this time the man pushed him away from the door. As he looked inside *"I saw that there was food cooking in the frying pan and I took the frying pan and I threw the food down. When I threw the food down the man became agitated and started to push me out."* It was then that his friends came to see what was happening due to the noise that ensued from their quarrelling. Meanwhile he saw a bottle of clothes detergent and Antonia with a small phone and he took them but upon taking the phone it fell on the floor and as he and the man tried to grab it, the man fell on the floor. He leapt back up and he was covered in tomato sauce. Kah tried to leave but the man went into Antonia's room, got a knife and tried to attack him but he avoided getting hurt. He then left and went to his room and soon after the Police were at the door.⁴ He further admitted that he used to have sexual intercourse with both mother and daughter as they were prostitutes. He denied having a fight with the man and explains that the injuries the latter suffered were due to his slipping on the floor which was covered with soup so much so that he ended up covered with sauce and *"I laughed at him because this was God's*

³ Fol.11-14

⁴ Fol.19

justice. This was before he came at me with the knife.... he had a butcher's knife...I did not touch him with the frying pan".⁵

Touman Dampha also released a statement and explained how on the night in question he was asleep when the argument woke him up. *"I met two guys on the steps who were fighting. I went there to separate them. I kept separating them until I was tired and then I left them because they would not stop."* He saw the white man holding a knife and the coloured man holding a frying pan and there was the floor covered with soup. The white man suffered injuries on his face but he couldn't remember where. This man used to accompany Antonia out of their room whilst male customers entered the room. Dampha insists that only the two men were fighting and he *"saw them on the steps.....holding each other and the white man was trying to keep the black man from entering the room. Then I separated them and they went inside the room and started the fight again. Then the black guy grabbed the frying pan which was full of soup and was going to leave with it."* This led the white man to pull back the former and the soup fell onto the floor splattering over Dampha in the process so he left. Whilst leaving he saw the white man holding a knife and the coloured man holding a frying pan and trying to hit the white man.⁶

The **Current Incident Report**⁷ which was confirmed on oath by PS1037 Saviour Mifsud,⁸ makes mention of how Abdel Raouf phoned his lawyer, who was present with a client who at the time was releasing a statement to the Police, stating that he had been attacked by three coloured men. This led the police to go on scene where they learnt that three (3) man had knocked on Raouf's door demanding to have sex with his girlfriend. When he refused to let them in, they attacked him with one of the men hitting him with a frying pan and inflicting a laceration to his face. As they were leaving one of the men grabbed a mobile phone which belonged to Miriam Elabed.

Upon this information the police, accompanied by Abdel, began checking the various rooms in a bid to identify the assailants and Dampha was the first to be identified and subsequently Kah, who was also indicated as the one having stolen Elabed's phone. Bayo was also arrested later as he returned to the house.⁹

PS1037 Saviour Mifsud describes how the mobile phone taken by Kah was found on the mattress in Kah's room.¹⁰

⁵ Fol.20

⁶ Fol.25-26

⁷ **Dok.M** a fol.28

⁸ Fol.91

⁹ Fol.31-32

¹⁰ Fol.91

Dr. Noel Bianco testified how whilst attending the police station with a client, he received a phone call from the injured party, also a client, who informed him he had just been beaten by assailants who had gone to his apartment. The interrogating officer, Inspector Camilleri, proceeded to go on scene together with Dr. Bianco. Raouf was found with blood coming from his forehead and he could not move his hands. On scene were his girlfriend and her mother as well as the three defendants.¹¹

Abdel Raouf explained that he was cooking at his girlfriend's flat, which is a room half the size of Hall 8. There was a knock at the door and upon opening, he found Kah Abdoulie who told him to move out of the way so he enters the flat. Elabed and her mother were watching tv at the time. Miriam told him not to let him in as she didn't know him. He tried to stop him from entering but Kah forced his way in by pushing him out of the way. Soon after another two came and Tampha entered the flat too. Kah got to the kitchen, got hold of the frying pan, emptied it from its contents and began waving it around. This is where he got hit by Kah "*Laqaghtni ġo wiċċi hawnhekk [forehead]*" whilst Tampha was punching him. Once hit by the frying pan he became dizzy and fell to the ground. Kah and Tampha kept hitting him. Kah proceeded to take Antonia's phone and ran out together with Tampha.¹² **Bayo had remained at the door but had left earlier, "it-tielet wiehed ma rajt xejn"**.¹³ The incident prompted him to call his lawyer. The mobile was also found in one of the rooms.¹⁴ His injuries consisted in broken arms, punches to his back and his forehead above the eyes which led to his having difficulty in vision.¹⁵

Miriam Elabed testified how on the night in question as she was going up to her room she saw Kah who wanted to speak to her. Moments after she heard a knock at the door and Abdel Raouf opened to find Kah whom she heard asking to speak to her.¹⁶ Kah kept insisting to talk to her even though she did not want to, and proceeded to push aside Raouf, who was trying to hold him off. Kah made his way into her room with Dampha Tauman following him and began punching Raouf. Kah hit Raouf with the frying pan and then entered her bedroom and began tearing apart electric plugs. At this point Raouf, who had collapsed after being hit, came to and grabbed Kah telling him to leave. Her mother then tried to call the police on her mobile and Kah grabbed it and ran off and so did Tauman. She failed to identify Bayo as one of the assailants.¹⁷

¹¹ Fol.56-57

¹² Fol.64-66

¹³ Fol.66

¹⁴ Fol.68

¹⁵ Fol.69-70

¹⁶ Fol.76

¹⁷ Fol.74-78

Antonia Zerafa corroborates her daughter's version adding that upon being hit with the frying pan Raouf fell to the ground.¹⁸ Tampha had also entered with Kah and was hitting Raouf. As she was on her mobile trying to call the Police, Kah grabbed it and left.¹⁹ Regarding Musa Bayo the witness states that he had **absolutely no involvement** in the altercation going further and making it a point to add that **Bayo "Beda jifred. Beda jimbutahom biex jiffridhom milli jiggieldu...ma rajtux jiggiel"**.²⁰ Concluding her testimony she mentions that Kah had also taken clothes detergent and her inhalers.²¹

The Court is truly perplexed why an innocent person was arraigned in the first place. Exposing a person to criminal proceedings indiscriminately is truly a disservice to justice and the more so reflects badly on the Prosecution whose role it is to exercise immense scrutiny and discernment when proceeding to charge an individual. Criminal proceedings have a potentially traumatic and devastating effect on peoples' lives, not to mention that they rob an individual of his earnestly gained financial resources which go to financing his defence, unjustly depriving him of days on end spent in the Law Courts and in the dock which time could have been lived freely.

In this unfortunate case, it was the prosecution's duty, once having ascertained that Bayo had no involvement in the incident to make its case for a *nolle prosequi* although admittedly, seeing that the Court as differently presided, had concluded that with respect to Bayo there was also a case to answer, a confounding decision in itself spurred by the defence for Musa not contesting a *prima facie* finding, could have contributed to the prosecution opting to continue with proceedings against defendant Musa Bayo. The injustice towards Musa Bayo is compounded by the fact that six months later when the Court, as differently presided, was again called upon to decide whether a *prima facie* case existed, there was no contestation by the defence and the Court proceeded for the second time to find that there was a case to answer with respect to the three defendants.

Dr. Mario Scerri, who was appointed to examine the injured party, testified that Raouf only indicated a light scar on the right side of the supraorbital ridge which he suffered as a result of an aggression which dated to the 19th March 2024. Thus no mention was made as to the injuries he purportedly suffered as a result of the altercation with Dampha Tauman and Kah Abdoulie which allegedly took place a year earlier.

¹⁸ Fol.82-83

¹⁹ Fol.84

²⁰ Fol.87

²¹ Fol.88

However the evidence leads the Court to find that Abdel Raouf indeed suffered injuries to his face and hands.

In fact in the **Current Incident Report** it is stated that the officers witnessed that Raouf had suffered “*qasma kbira fuq wiccu li bdiet tnixxi ammont ta' demm minn go fiha u beda jilmenta li qed ihossu mugugh*”.²² A medical certificate issued on the 1st May 2023 at 03:33am found that Raouf had suffered fractures to his hands and a 2cm lacerated wound above the right brow line. Although this certificate was not authenticated by the issuing doctor who had since left the Maltese islands, the Court deems that the evidence tendered by the injured party as well as PS1037,²³ PC1027,²⁴ PC787²⁵ and PC852²⁶ leave no doubt as to the fact that Raouf indeed suffered injuries to his face.

This is a finding which the Court can lawfully arrive at without their being need of having a medical expert testify as to the nature and extent of the injuries suffered. In fact, the Court of Criminal Appeal in **Il-Pulizija vs Joseph Garrett** held: ²⁷

Issa l-ewwel aggravju huwa dwar in-natura tal-ġrieħi. L-appellant issottometta li l-ġrieħi ma damux u allura ma jistgħux jitqiesu ġrieħi li jaqgħu taħt l-artikolu 216 tal-Kap 9. Iżda l-ġurisprudenza tal-Qrati Maltin ma taqbilx ma' din is-sottomissjoni. Filfatt il-Qorti tal-Appell Kriminali fil-5 ta' Frar 1998 fil-każ '**Il-Pulizija versus Fortunato Sultana**' qalet hekk:

*'Skont l-artikolu 216(1)(b) tal-Kap 9, l-offiża fuq il-persuna hija gravi jekk, fost ċirkostanzi oħra, iġġib sfreġju fil-wiċċ. Il-Liġi ma tirrikjedix li dan l-isfreġju jipperdura għal xi żmien partikolari; sfreġju fil-wiċċ (jew fl-għonq jew f'waħda mill-idejn) anke ta' ftit ġranet jibqa' sfreġju għall-finijiet tal-imsemmija dispożizzjoni. Il-permanenza ta l-isfreġju hi rilevanti biss meta, abbinata mal-gravità', tagħti lok għal hekk imsejġha 'offiża gravivissima' skont l-artikolu 218 (1)(b) tal-Kap 9.'*¹

Għal dak li huwa sfreġju jew mankament, il-Qorti qed tagħmel referenza għall-każ '**Il-Pulizija versus Paul Spagnol**' tat-12 ta' Settembru 1996 (Volume LXXX) fejn intqal hekk:

'B'mankament fil-wiċċ il-liġi qed tirreferi għal kull deterjorament tal-aspett tal-wiċċ li, anke mingħajr ma jnissel ribrezz jew ripunjanza, jipproduci sfigurament "cioe' peggioramento d'aspetto notevole o complessivo o per l'entità della alterazione stessa, o per l'espressione d'assieme del volto". Sfreġju, mill-banda l-oħra u a differenza ta' mankament, hija kull ħsara li tista' ssir filregolarità tal-wiċċ, fl-armonija tal-lineamenti tal-wiċċ, u anke f'dik li hija s-sbuħija tal-wiċċ. Skont ġurisprudenza ormai pacifika, din il-ħsara li tammonta għal sfreġju trid tkun viżibbli minn distanza li hi dik "li soltu jkun hemm bejn in-nies meta jitkellmu ma' xulxin". Skolorament tal-gilda jista' jipproduci kemm sfreġju kif ukoll mankament fil-wiċċ. Is-snien mhumix parti mill-wiċċ, għalkemm it-telf ta' ħafna snien jistgħu jgħibu kemm sfreġju kif ukoll mankament minhabba l-effett li jistgħu iħallu fuq il-wiċċ u speċjalment fir-

²² Fol.32

²³ Fol.91

²⁴ Fol.104

²⁵ Fol.106

²⁶ Fol.128B-128C.

²⁷ Per Judge Dr. Lawrence Quintano, App. No. 169/2011. Dec.14/05/2012.

reġjun tal-ħalq. Pero' la t-tul ta' l-infermita' u lanqas il-permanenza o meno tagħha m'huma rilevanti għall-finijiet tas-subartikolu 216 (1) (b).²⁸

U għall-kompletezza l-Qorti qed tirreferi għal dak li qalet il-Qorti tal-Appell Kriminali fil-każ '**II-Pulizija vs Generoso Sammut**' tat-2 t'Awissu 1999 dwar l-offiża fuq il-persuna:

*'Hi żbaljata l-idea, spis ventilata, li biex issir il-prova skont il-Liġi u sal-grad li trid il-Liġi ta' offiża fuq il-persuna hemm bżonn ta' ċertifikat mediku jew tad-depożizzjoni ta' tabib. Tali ċertifikat jew depożizzjoni jistgħu jkunu meħtieġa jekk mid-depożizzjoni ta' xhieda oħra, inklużi l-parti offiża, jibaqa' xu dubju reġonevoli dwar jekk verament kienx hemm offiża fuq il-persuna u jew tat-tip jew natura ta' dik l-offiża.'*²⁹

Għall-fatti ta' dan il-każ huwa rilevanti l-artikolu 216(1)(a)(b) tal-Kap 9. B'mod partikolari is-subinċiż (b) –
'jekk iġġib mankament jew sfregju fil-wiċċ, fil-għonq jew f'waħda mill-idejn tal-offiż'.

Fil-fehma tal-Qorti l-ksur tal-imnieher (ara ritratti) kif ukoll il-laċerazzjoni jistgħu faċilment jitqiesu kemm sfregju kif ukoll mankament. Anzi, xkont ix-xhieda tat-tabib Martin Camilleri, il-laċerazzjoni setgħet tħalli traċċi permanenti. Id-difiża tinsisti li m'hemmx prova li l-isfregju jew mankamant dam għal tletin ġurnata jew iżjed. Bir-rispett kollu, kif sewwa spjegat il-Qorti fil-każ '**II-Pulizija versus Spagnol**', dan it-tul ta' żmien mhux rikjest mil-liġi fissubinċiżi li għalihom qed issir referenza. Din l-idea żbaljata qed tirriżulta minħabba li s-subparagrafu (d) jsemmi t-tul ta' żmien iżda dan is-subparagrafu huwa indipendenti u għandu jitqies għalih u qatt ma jista' jew għandu jinqara bħala xi kwalifika għas-subparagrafi preċedenti.

The same Court, differently presided, in **II-Pulizija vs Salvinu Vella** differentiated between the types of offences contemplated by articles 216, 218 and 221 of the Criminal Court:³⁰

17. L-artikolu 216 (1)(b) jikkellem fuq mankament jew sfregju fil-wiċċ, fil-għonq jew f'wahda mill-idejn tal-offiż. It test Inkliż juza l-kelma "hands" u dan hu ta' għajjnuna għad-dibattitu mqanqal mill-imputat meta jgħid li la darba l-ligi titkellem fuq l-idejn dan minnu nniffsu jeskludi id-drigh, ossia li l-id ma tinkludix id-drigh. Tajjeb li ssir referenza għal dak li jinsenja l-Professor Mamo fin-**Notes On Criminal Law** – Revised Edition 1954-1955 pp 228 meta jelenka l-elementi ta' dan ir-reat u jgħid: "Any external injury which detracts from the appearance of the face, or of the neck or of either of the hands – the most conspicuous parts of the human body..." (Sottolinear tal-Qorti);

18. Meta offiża ggib mankament jew sfregju fill-wiċċ, l-għonq jew wahda mill-idejn, dik l-offiża tkun wahda gravi ex artikolu 216(1) (b) tal-Kodici Kriminali anke jekk dak l-isfregju jdum għal ftit hin. Jekk jipperdura, fejn allura jkun jehtieg ezami vizwali minn distanza mhux ragjonevoli, dak l-isfregju jitqies sfregju gravi fit-termeni tal-artikolu 218(1)(b).

Tajjeb li in rigward issir referenza għas-sentenza ta' din il-Qorti tat-28 ta' Marzu 2008, **II-Pulizija vs Desmond Falzon**, li ccit b'approvazzjoni s-sentenza tagħha **II-Pulizija vs Paul Spagnol** tat-12 ta' Settembru 1996, fejn kien ritenut hekk:

²⁸ Volume LXXXII. 1998 Parti IV, Page 109

²⁹ Vol LXXXIII.1999.Pt.IV, Page 365

³⁰ Per Judge Giovanni M Grixti LL.M., LL.D.; App. No.496/2015. Sitting of the 30.09.2019

B'mankament ... fil-wicc, il-ligi qed tirreferi għal kull deterjorament ta' l-aspett tal-wicc li, anke minghajr ma jnissel ribrezz jew ripunjanza, jipproduci sfigurament "cioe' peggioramento d'aspetto *notevole o complessivo, o per l'entità della alterazioni stessa o per l'espressione d'assieme del volto*" (Manzini, V., Trattato di Diritto Penali, Volume Ottavo, Cap. XXVIII, p. 235). Sfregju, mill-banda l-oħra u a differenza ta' mankament, hija kull hsara li tista' ssir fir-regolarita' tal-wicc, fl-armonija tal-lineamenti tal-wicc, u anke f'dik il-hija s-sbuhija tal-wicc. Skond guriprudenza ormaj pacifika, din il-hsara li tammonta għal sfregju trid tkun vizibbli minn distanza li hi dik 'li soltu jkun hemm bejn in-nies meta jitkellmu ma' xulxin' (II-Pulizija vs Emily Zarb App Krim. 15/2/58, Kollezz. Deciz. XLII.iv.1245, 1248). Għalhekk mhix korretta l-proposizzjoni li temergi mill-bran tas-sentenza appena citata, li jekk ikun hemm cikatrici necessarjament hemm sfregju, iżda ma jkunx hemm sfregju jekk ikun hemm simplici skolorament tal-gilda. Anke skolorament tal-gilda jista' jipproduci kemm sfregju kif ukoll mankament fil-wicc fis-sens spjegat. Kollox jiddependi mill-entità tal-hsara; mhux importanti x'tissejjah il-hsara fil-gergo mediku jew popolarment; dak li hu importanti hu l-effett li thalli fuq il-wicc.

19. Naturalment dak li intqal dwar il-wicc huwa ugwalment applikabbli għall-ghonq u għall-idejn. Għalhekk sabiex ikun pruvat l-aspett materjali ta' dan ir-reat mhux necessarju li l-offiza tkun tali li "tista" thalli mankament jew sfregju. Dik il-possibilita' tirrafigura biss fl-ezami tar-reat kontemplat fl-artikolu 216(1)(a). Sabiex tkun skontata l-prova tar-reat kontemplat fl-artikolu 216(1)(b) huwa bizzejjed li l-offiza kienet fuq l-idejn, fl-ghonq jew fuq il-wicc u l-kwistjoni ta' permanenza jew possibilita' jew probabilita' ta' permanenza ma jiccentraw xejn. Dan hu hekk għaliex il-legislatur donnu jagħti protezzjoni specjali għal dawk l-estremitajiet tal-ġisem li solitament huma dejjem mikxufin u għaliex mankament jew sfregju fihom igibu magħhom il-konsegwenzi naturali u ovvji fuq l-offiz.

20. Fis-sistema legali tagħha, l-offiza fuq il-persuna tista' tkun wahda hafifa u ta' importanza zghira, hafifa, gravi jew gravissima. Issa, kif tajjeb imfisser fis-sentenza ta' din il-Qorti fl-ismijiet **II-Pulizija vs Fortunato Sultana** tal-5 ta' Frar 1998, fost diversi oħrajn, il-ligi ma tirrikjedix li l-isfregju jipperdura għal zi zmien partikolari. Sfregju fil-wicc, fil-ghonq jew f'wahda mill-idejn anke jekk ta' f'tit zmien jibqa' sfregju għall-finijiet ta' l-imsemmija disposizzjoni. Il-permanenza ta' l-isfregju hi relevanti biss meta, abbinata mal-gravita', tagħti lok għal-hekk imsejha "offiza gravissima" skond l-artikolu 218(1)(b) tal-Kodici Kriminali. Għal-esposizzjoni aktar profonda tal-kwistjoni in tema, tajjeb li ssir referenza ukoll għas-sentenza ta' din il-Qorti deciza fil-15 ta' Frar 2011 fl-ismijiet **II-Pulizija vs Jonathan Farrugia** fejn oltre s-sentenza citata saret refeneza għal-diversi sentenzi oħra foshom dik **II-Pulizija vs Antonio sive Anthony Randich** tat-2 ta' Settembru 1999 kien ritenut hekk:

Kif din il-Qorti kellha l-opportunita' li tirrimarka f'okkazzjonijiet oħra, 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 tfig. Huwa biss fil-kaz tal-hekk imsemmija '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 setgħet legalment u ragjonevolment..."

21. Fi kliem ieħor, offiza gravi tista' ssehh fuq kull parti tal-ġisem, pero' fejn si tratta tal-wicc, l-ghonq jew l-idejn hija dejjem gravi jekk iggib sfregju anka għal f'tit hin kif fuq spjegat. F'kaz ta' permanenza, dik l-offiza tkun gravissima. Issa jekk l-offiza ssir fuq parti oħra tal-ġisem il-kwistjoni dwar jekk tkunx wahda hafifa, gravi jew gravissima tiddependi minn jekk tirrientrax f'dak razzat fil-kumplement tal-artikoli 216, 218 u fin-nuqqas 221(1).

22. Hija l-fehma ta' din il-Qorti illi la darba l-offiza mhix fuq il-wicc, l-ghonq jew l-idejn tal-kwerelant, u la darba ma gabet ebda wahda mill-konsegwenzi msemmija fl-artikoli 216 jew 218 fuq xi parti oħra tal-gisem, l-offiza hija wahda hafifa. Ghalhekk filwaqt li ma tistghax tinsab htija ta' offiza gravi qed tinsab htija ta' reat anqas gravi u cioe' ta' offiza hafifa fit-termini tal-artikolu 221(1) tal-Kodici Kriminali bl-aggravanti msemmi fis-subartikolu (2);

The same Court in **Il-Pulizija vs Zachary Vella**, had the following considerations to make:³¹

Illi fl-ahhar aggravju minnu intentat l-appellant jikkontendi illi l-griehi sofferti mill-appellant ma jaqghux taht id-dettami tal-artikolu 216(1)(b) tal-Kodici Kriminali billi s-snien ma jiffurmawx parti mill-wicc u ma jwasslux għall-elementi tal-isfregju skont kif rikjest mill-liġi.

L-appellant jigi mixli u misjub hati tar-reat tal-offiza gravi kif mahsub fl-artikolu 216(1)(b) tal-Kodici Kriminali:

216. (1) L-offiza fuq il-persuna hija gravi, u għaliha tingħata l-piena ta' prigunerija minn tlett xhur sa tlett snin –

(b) jekk iggib mankament jew sfregju fil-wicc, fil-ghonq jew f'wahda mill-idejn tal-offiz;

Illi:

Skont l-artikolu 216 (1)(b) tal-Kodici Kriminali, l-offiza fuq il-persuna hi gravi jekk, fost cirkostanzi oħra, ggib 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 għall-finijiet ta' l-imsemmija disposizzjoni. Il-permanenza ta' l-isfregju hi rilevanti biss meta abbinata mal-gravita, tahti lok għal hekk imsejja "offiza gravvissima" skont l-artikolu 218 (1) (b) tal-Kodici kriminali³²

Dan l-isfregju jikkonsisti f':

B'mankament fil-wicc il-ligi qed tirreferi għall-kull deterjorament ta' l-aspett tal-wicc li, anke mingħajr ma jnissel ribrezz jew ripunjanza, jipproduci sfigurament "cioe' peggioramento d'aspetto notevole o complessivo o per l'entita' della alterazione stessa, o per l'espressione d'assieme del volto". Sfregju, mill-banda l-oħra u a differenza ta' mankament, hija kull hsara li tista' ssir fil-regolarita' tal-wicc, fl-armonija tal-lineamenti tal-wicc, u anke f'dik li hija s-sbuhija tal-wicc. Skont gurisprudenza ormai pacifika, din il-hsara li tammonta għal sfregju trid tkun vizibbli minn distanza li hi dik "li soltu jkun hemm bejn in-nies meta jtkellmu ma' xulxin". Skolorament tal-gilda jista' jipproduci kemm sfregju kif ukoll mankament fil-wicc. Is-snien mhumiex parti mill-wicc, ghalkemm it-telf ta' hafna snien jistghu jgibu kemm sfregju kif ukoll mankament minhabba l-effett li jistghu ihallu fuq il-wicc u speċjalment fir-regjun tal-halq. Pero' la t-tul ta' l-infermita' u lanqas il-permanenza o meno tagħha m'huma rilevanti għall-finijiet tas-subartikolu 216 (1) (b).³³

³¹ Per Judge Dr. Edwina Grima LL.D.; App. No. 46/2017; Sitting of the 3rd May 2019.

³² **Il-Pulizija vs Fortunato Sultana**; Court of Criminal Appeal, Per Judge Vincent Degaetano; Dec. 5th February 1998.

³³ **Il-Pulizija vs Paul Spagnol** Court of Criminal Appeal, Per Judge Vincent Degaetano; Dec.12th September 1996.

[Emphasis by the Court]

Illi mill-provi prodotti jirrizulta illi l-parti leża mhux sempliċiment tilef żewġ sinnet ta' quddiem iżda sofra wkoll frattura fl-għadam ta' ħalqu li filfatt ikkaġuna l-ispostament ta' waħda mis-snien li eventwalment tilef.

Irrizulta mix-xhieda tad-dentist Chistopher Satariano kif ukoll mill-espert maħtur mill-Ewwel Qorti Dr. Pasqual Demajo illi apparti li ntilfu dawn is-snien irrizultat frattura fl-għadma tal-ħalq tal-parti leża li mix-xhieda prodotta ħadet iż-żmien sabiex taqleb għall-aħjar. Wkoll kif gie kkonfermat minn dan l-espert, dawn il-ġrieħi kienu kompatibbli mal-offiza sofferta f'dan l-incident u ma kien hemm l-ebda incident ieħor li fiħ seta' kien involut il-vittma qabel dan il-każ li seta' ikkontribwixxa għad-deterjorazzjoni tal-ferita in kwistjoni. In oltre l-provi riskontrati kollha jikkonfermaw wkoll li l-vittma kellu diffikulta sabiex jiekol minħabba l-kundizzjoni tiegħu apparti effetti oħra psikoloġici.

Dan fil-fehma ta' din il-Qorti u fid-dawl ta' ġurisprudenza hawn fuq iccitata iwassal għal mankament fil-wicc, liema mankament jaqa' sewwasew fil-parametri tal-artikolu 216(1)(b) tal-Kodici Kriminali u konsegwentement is-sejbien ta' ħtija a baži ta' din id-disposizzjoni tal-ligi hija waħda legalment u raġjonevolment korretta u ser tiġi kkonfermata mill-ġdid minn din il-Qorti.

Consequently, on the basis of the evidence coupled to cited jurisprudence the Court finds that the prosecution proved beyond reasonable doubt that Raouf suffered grievous injuries to the face and hands in terms of Articles 216(1)(b) of the Criminal Code.

In view of the foregoing the Court finds that Kah Abdoulie and Dampha Tauman are guilty of the first offence.

The second charge attributed to the defendants is that of theft aggravated, *inter alia*, by violence. In fact, among the articles of law indicated by the Attorney General, Article 274(b) of the Criminal Code was indicated. This article provides that where theft is accompanied by violence the punishment contemplated for that offence is that of imprisonment between three (3) to nine (9) years imprisonment.

However, in this case Kah committed the theft as he was leaving Zerafa's room, having already injured Raouf. The two acts were separate and distinct so much so they were committed on different persons with no violent acts having been perpetrated on Antonia (Tania) Zerafa. As such article 274(b) of the Code finds no application to the facts of this case.

Moreover, based on Musa Bayo's truthful account, it is this Court's belief that Kah's actions did not tantamount to theft but to an act of the arbitrary exercise of pretended rights, where he sought to take items to offset the twenty Euros (€20) Elabed had swindled him out of. Kah was not charged with the offence

contemplated by Article 85 of the Criminal Code and thus the Court is precluded from finding him guilty of this offence in lieu of the offence of theft.

The substantive elements of the offence of the arbitrary exercise of pretended rights were affirmed in the judgement in the names **Il-Pulizija vs Emanuel Abela**:³⁴

Fil-kawża fl-ismijiet **Il-Pulizija vs. Georgina Gauci**, deciza fis-7 ta' Jannar 1998, il-Qorti tal-Appell Kriminali (Sede Inferjuri) qalet hekk:

"[F]il-ligi taghna r-reat ta' ragon fattasi mhux meqjus bhala delitt kontra l-proprjeta' izda bhala delitt kontra l-amministrazzjoni tal-gustizzja u amministrazzjonijiet pubblici ohra".

Illi l-Qorti tinnota li huwa ormai stabbilit li l-elementi kostitutivi tar-reat ta' ragon fattasi, huma erbgha, u cioe:

"(1) att estern li jispolja lil xi hadd iehor minn haga li jkun qieghed igawdi, liema att ikun ezegwit kontra l-opposizzjoni, espressa jew presunta, ta' dan il-hadd iehor;

(2) il-kredenza li l-att qieghed isir b'ezercizzju ta' dritt;

(3) il-koxjenza fl-agent li hu qieghed jaghmel di private braccio dak li jmissu jsir permezz ta' l-awtorita` pubblika (jew, fi kliem il-Crivellari, Il Codice Penale per il Regno d'Italia Interpretato ecc., Torino, 1895, Vol. VI, pagna 749, 'la persuasione di fare da se' cio` che dovrebbe farsi reclamando l'opera del Magistrato'); u

(4) in-nuqqas ta' titolu li jirrendi l-fatt aktar gravi (ara, fost diversi sentenzi, **Il-Pulizija vs. Salvatore Farrugia**, Appell Kriminali 14 ta' Dicembru, 1957, Vol. XLI.iv.1506; **Il-Pulizija vs. Carmel sive Charles Farrugia**, Appell Kriminali 17 ta' Frar, 1995; **Il-Pulizija vs. Carmelo Ciantar**, 18 ta' Settembru, 1996; ara wkoll **Falzon, G.**, Annotazioni alle Leggi Criminali (Malta), 1872, p. 123).

Hu risaput - u dan, del resto, johrog mill-istess definizzjoni tar-reat in dizamina - li l-istess att materjali jista' jaghti lok ghar-reat ta' ragon fattasi jew ghal reat iehor (hsara volontarja, serq), u jekk ikunx hemm dana r-reat ta' ragon fattasi jew xi reat iehor ikun jiddependi mill-intenzjoni tal-agent. Hu rrelevanti jekk dina l-intenzjoni tikkwalifikax bhala intenzjoni specifika jew intenzjoni generika".³⁵

Ovvjament huwa sufficjenti li jikkonkorru l-ewwel tliet elementi. Ghall-finijiet tar-reat ta' ragon fattasi huwa bizzzejjed xi forma ta' pussess.

Moreover, the Court of Criminal Appeals had the following considerations to make in its judgement in the names **Il-Pulizija vs Denise Caruana**:³⁶

"..... kwistjonijiet dwar titolu ma jistghux ikollhom effett sabiex tigi stabbilita jew eskluza ir-reita'. Dan ghaliex dak li trid tindaga il-Qorti huwa jekk kienx jezisti stat ta' fatt li gie mibdul unilateralment

³⁴ Per Hon. Magistrate Dr. Neville Camilleri; Compil. No.866/2011; Dec.13.10.2014

³⁵ Criminal Appeals. **Il-Pulizija vs. Mario Lungaro**, 18.11.1996.

³⁶ Per Judge Dr. Edwina Grima Dec. 30.11.2016

minn parti wahda tant illi l-vittma ta' dan ir-reat tigi ipprivata mill-uzu jew tgawdija ta'l-oggett li kien **fil-pussess tagħha** qabel dak l-att spoljattiv.....

Illi l-elementi tar-reat in dizamina gew migbura mill-Ewwel Qorti fid-decizjoni tagħha, liema esposizzjoni tad-dritt hija dettaljata tant illi din il-Qorti ma ghandha ghalfejn izzid xejn iktar fir-rigward. Jigi osservat biss illi:

“Din il-Qorti tibda biex tgħid li r-reat kontemplat fl-Artikolu 85 tal-Kodici Kriminali ma hux intiz biex jissostitwixxi l-azzjonijiet rivendikatorji jew xort'ohra li bihom dak li jkun jikseb ir-rikonoxximent tad-drittijiet tiegħu fi jew fuq proprjeta`, mobbli jew immobbli.

L-Artikolu 85 huwa intiz biex dak li jkun ma jiehux il-ligi b'idejh, u ghalhekk l-iskop wara din id-disposizzjoni – bhad-disposizzjonijiet fil-kamp ċivili dwar l-actio spoli – huwa li tipprotegi l-*istatus quo*.³⁷....

“Għall-finijiet tar-reat ta' ragon fattasi 'il-pussess materjali, jew detenzjoni, hu sufficjenti għall-avverament tal-ipotesi tal-ligi' (ara appell kriminali **II-Pulizija vs George Zahra**, 16 ta' Lulju 1958 – Vol. XLII.iv.1453). Min ikollu oggett misluf lilu għat-tgawdija tiegħu għandu l-pussess materjali ta' dak l-oggett. Taht l-artikolu 85 tal-Kodici Kriminali ma hemm ebda bzonn li jigi ippruvat xi element ta' pussess aktar sostanzjali minn hekk.³⁸[emfazi tal-Qorti]

Reference is also being made to **II-Pulizija vs Eileen Said** wherein the Court held:³⁹

Illi l-appellanti instabet hatja tar-reat ta' “ragon fattasi” jew dak li jissejjah “the exercise of a pretended right” . Illi din l-azzjoni bazata fuq l-Artikolu 85 tal-Kap.9 tal-Ligijiet ta' Malta hija speci ta' zona grigja bejn il-kamp ċivili u dak kriminali , tant li Sir Andrew Jameson meta kien qed jigi abbozzat il-Kodici Penali Malti kien osserva fir-Rapport tiegħu fir-rigward li :-

“It is doubtful whether acts of this kind would not be better left to the operation of the ordinary civil remedies by way of interdict of or claim for damages.....” (Ara Prof. Sir Anthony Mamo - Notes on Criminal Law” (Parti Speciali) Vol. II)

Illi l-elementi tar-reat in dizamina gew magisterjalment migbura fid-definizzjoni analitika mogħtija mill-Imhalef W. Harding fis-sentenza ta' din il-Qorti fil-kawża “ **II-Pulizija vs. Giuseppe Bonavia et.** “ (App.Krim. 14.10.1944 , Vol.XXXII - IV , p.768) u dawn jinkludu :-

- a) att estern li jimpedixxi persuna ohra minn dritt li hija tgawdi, u li jkun sar bid-dissens esplicitu jew implicitu ta' dik il-persuna .
- b) l-imputat irid jemmen li qed jagixxi bi dritt ;
- c) ix-xjenza tal-imputat li qed jiehu b'idejh dak li suppost jiehu tramite l-process legali ;
- d) li l-att ma jinkwadrax ruhu f'reat aktar gravi .

Illi kif dejjem g'ie ritenut element importanti kostituttiv ta' dar-reat hu dak intenzjonali fis-sens li l-agir ta' dak li jkun irid ikun magħmul bil-hsieb li hu qed jezercita dritt li jahseb li għandu għad-distinzjoni mir-reati ta' serq jew danni volontarji fuq proprjeta' ta' haddiehor per ezempju . Għalhekk hemm bzonn li issir indagni fuq il-movent li jkun wassal lill-persuna li ikkommettiet dar-

³⁷ **II-Pulizija vs Jane Scicluna** – Court of Criminal Appeals

³⁸ Court of Criminal Appeals; **II-Pulizija vs Mario Bezzina**; Dec.26/05/2004

³⁹ Per Judge Dr. Joseph Galea Debono; Dec.19.06.2002; App. No.37/2002 JGD.

reat biex taghmel dak li ghamlet . L-element materjali invece jikkonsisti filli wiehed jippriva persuna ohra minn xi dritt fuq haga li ghandu id-dgawdija taghha.

Ir-reat ma jissussistix meta l-att materjali jikkonsisti fir-retenzjoni ta' pussess li dak li jkun gja ikollu. Hemm bzonn li jkun hemm att pozittiv li jippriva lit-terz, jew ifixklu fil-pussess tal-haga ghax kif jghid il-CARRARA (Prog. Parte Speciale Vol.5 para. 2850) :-

“L'atto esterno deve privare altro contro sua voglia di un bene che gode . Chi e' nell'attuale godimento di un bene e continua a goderne a dispetto di chi non voglia ; non delinque perche' la legge protegge lo “stato quo” , il quale non puo' variarsi tranne per consenso degli interessati o per decreto della autorita' giudiziale.

Hence both Kah and Tauman are being acquitted from the charge of theft as well as the third and fourth charges since no evidence was presented to substantiate the latter accusations.

For reasons already cited above, Musa Bayo is being acquitted of all charges.

Punishment

In its considerations on punishment the Court took note of the offences of which Kah and Tauman are being found guilty, their clean criminal records and the circumstances of the case, most notably that at no point did the defendants express remorse over the incident.

Given that this is a case where acts of violence were unleashed on the injured party, the Court also gave due weight to judgements which opined that in cases involving violence a finding of guilt would be met with incarceration as punishment.

In Il-Pulizija vs Josef Camilleri the Court of Criminal Appeal held:⁴⁰

Illi umbaghad, kif anki gie ritenut mill-Qorti tal-Appell Kriminali (diversament preseduta) fil-kawza **“Il-Pulizija vs. Joseph Azzopardi”** [30.7.2004] :-

“... bhala regola, meta si tratta ta' vjolenza fuq il-persuna il-piena ghandha tkun dejjem dik ta' prigunerija b' effett immedjat . Il-Qrati ta' Gustizzja Kriminali ghandhom ikunu minn ta' quddiem biex b'mod deciziv jirripistinaw l-ordni pubbliku meta dan jigi zventrat mill-arroganza jew il-prepotenza li timmanifesta ruha f' xi forma ta' vjolenza fizika ” (sottollear ta' din il-Qorti)

u zgur li f' dan il-kaz l-appellant wera grad gholi ta' prepotenza w arroganza fl-incident de quo li ma jistax jigi kondonat mill-Qrati.

⁴⁰ Per Judge Joseph Galea Debono; Dec. 15.11.2007; App. No. 268/2007

Similarly, the Criminal Court in the trial by jury in the names **Ir-Repubblika ta' Malta vs Victor Pace** declared:⁴¹

Dan it-tip ta' agir li, fortunatament f'dan il-kaz, ma kellux konsegwenzi aktar tragici, ma jista' jigi qatt kondonat mill-Qrati li ripetutament irritenew li "l-vjolenza ghandha, bhala regola generali, dejjem iggib maghha l-piena ta' prigunerija b'effett immedjat, aktar u aktar fejn jintuzaw armi" w li "mhuwiex inoltre tollerabbi li f'socjeta' civili persuna ggorr arma fuqha kontra l-ligi – hi x'inhi r-raguni." (Ap. Krim. Ir-Repubblika ta' Malta vs. Noel Mizzi [15-12-2005] u ohrain). Ghalhekk l-insenjament tal-oghla Qorti fil-kamp penali huwa li f'dawn il-kazijiet m'ghandix tinghata sentenza ta' prigunerija sospiza imma wahda effettiva w immedjata.

Decide

Consequently, the Court whilst acquitting Bayo Musa from all charges, having seen articles 17, 31, 214, 215, 216(1)(b) of the Criminal Code, finds Kah Abdoulie and Dampha Tauman guilty of the first offence, acquits them both from the other charges, and condemns them to a term of imprisonment of **one (1) year** from which term the time spent in preventive custody is to be deducted.

In terms of Article 533 of the Criminal Code, the Court orders Kah Abdoulie and Dampha Tauman to the payment of one hundred and fifty-one Euros (€151) each representing expert fees.

Finally, in terms of Article 370(6) read in conjunction with Article 392A of the Criminal Code, the Court orders that the Attorney General be given access to a scanned copy of the records, together with access to a scanned copy of the judgment.

Dr. Donatella M. Frendo Dimech
Magistrate

⁴¹ Per Judge Joseph Galea Debono; Dec. 25.01.2006. Bill of Indictment No. 27/2003