



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
MICHAEL MALLIA**

Sitting of the 3rd June, 2011

Criminal Appeal Number. 158/2010

The Police

Vs

Roger Ian Dobbyn

The Court,

Having seen the charge brought against the appellant Roger Ian Dobbyn before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 11th February, 2010 at approximately 20.00 hrs as well as in previous months, when several acts committed by him, even if at different times, constituting violations of the same provision of the law, committed in pursuance of the same design, in the premises 303 St. Julians Street, B'Kara, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right by his own authority, compelled another person to pay a debt, or to fulfil any obligation whatsoever, or disturbed

the possession of anything enjoyed by another person or in any other manner by unlawfully interfering with the property of his wife Irene Gordon Dobbyn.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 23rd March, 2010, by which, after that Court had seen section 85 of Chapter 9 of the Laws of Malta, found accused guilty of the charge brought against him since it had been amply proven, and since Irene Dobbyn never relinquished her rights to the matrimonial home, and condemned him to a fine (multa) of forty (€40).

Also ordered accused to give access to his wife to the matrimonial home, i.e. 303, Triq San Giljan, B'Kara, and this within two (2) weeks and failing to do so, he will be liable to a further four Euros and sixty six cents (€4.66) fine (multa) daily.

Having seen the application of appeal filed by appellant on the 6th April, 2010, wherein he requested this Court to reverse the said judgement and to acquit the appellant from the all charges and punishment.

Having seen the records of the case.

Now duly considers.

That the grounds of appeal can be briefly summarised as follows:-

1. The charge refers to a specific date and time – namely the 11th February 2010 at 20.00 hrs and to the months preceding. On the day in question, at no time did appellant come into any sort of contact with his wife (physical or verbal) and therefore it is unrealistic and impossible to assume that he could have done anything to interfere with her property within the terms of the law. As has been explained above on the 11th February, 2010 at 20.00 hrs, the only persons who appellant came in contact with were police officers who asked him to report to the police station. Since appellant had already received a police notice that same day, informing him to report to the

police station on the 13th February 2010 at 9pm or alternatively on the 14th February at 1.00 p.m., appellant was perfectly justified in informing the first constable who appeared outside his door that he had every intention going to the police station on the dates and times he had been ordered to. In fact, when the second police sergeant rang him up soon after, and informed him that his refusal to go to the police station would be in breach of the law, he immediately agreed to go to the station. Although his wife was present, there was no communication between either of them. When he was asked whether his wife was also the legal owner of the house in question, appellant answered in the affirmative and made no attempt to conceal the truth or to pervert the course of justice.

2. The affidavit of PS 839 (which is mainly based on Irene Dobbyn's version of the events) consists of a number of inaccuracies and paints a distorted picture of the situation, which are outlined hereunder.

(i) It is to be mentioned that Irene Gordon Dobbyn had already lodged a police report on the 10th February 2010, stating that she used to reside with her husband Roger Ian Dobbyn at their matrimonial house at 303, St. Julians Road, B'Kara and because of several differences between them on May 2008 she had to leave the house.

First of all, Mrs Dobbyn left the matrimonial home for the United States in January 2007 and not in May 2008 as is being suggested. Moreover, the assertion that Mrs. Dobbyn had to leave the house is misleading. Mrs. Dobbyn did not have to leave but chose to leave the matrimonial home and moved back to the United States of her own accord.

Someone who does not want to leave a marriage, would find it hard enough to leave a house, let alone to leave a country with a 20 foot container full of her belongings and worldly goods including furniture, china etc. The act of leaving a country is very significant indeed as it indicates a firm resolve. To this end, unasked, she even gave her husband her house key and it was agreed that their house would be put up for sale. Nobody forced Mrs. Dobbyn out

of her home and in fact on her first return to Malta after that, in April/May 2008 she even resided there for the entire duration of her three week stay. This is further evidence of the fact that there was no ill will on either part – appellant never turfed her out and never had any issues with Mrs. Dobbyn being in the house. Him and his wife were on perfectly civilized terms and moreover their separation was amicable and consensual.

(ii) So she decided to come back to Malta and when she went to her house, to her surprise, she found another woman who told her that she couldn't let her inside the house.

It is highly significant to note that Mrs. Dobbyn's decision to come to Malta in February 2010 was never communicated to appellant and he had no prior knowledge of her visit. Had Mrs. Dobbyn told her husband that she would be returning to Malta that February, perhaps she would have spared herself and everyone else the surprise as he would then have been in a position to make alternative arrangements which would have been convenient to all parties, as had been done in the past. As it happens, it was Mr. Dobbyn who was surprised to hear that his wife was in Malta.

As has already been pointed out, the charges preferred against appellant refer to the 11th February 2010 at 20.00 hrs and to the months preceding. During the months preceding the date of the incident, appellant's wife was abroad and therefore there was certainly no scope or need for any unlawful interference of her property on appellant's part. The situation might have been different had the charge referred to the 11th February 2010 and to the days preceding. However the charge as drafted does not envisage the encounter Mrs. Dobbyn had on the 10th February 2010, with the woman who told her she couldn't let her inside the house.

Moreover, on the 10th February 2010, appellant was not at home and Mrs. Dobbyn found a third party at the door – appellant therefore definitely can't be accused of refusing

his wife entry into the house at that time. This is even confirmed by Mrs. Dobbyn who told the policeman that she was not let inside her house and that she could not reach her husband (see PS 3's affidavit page 1 paragraph 3).

(iii) The police tried several times to contact Robert Ian Dobbyn, so that he could be spoken regarding this report but this always resulted in the negative.... The Police made several other attempts to contact Roger Dobbyn and when he was finally reached, he refused to speak to the Police

The only knowledge that appellant has of any police attempts to contact him are those of 11th February 2010 when the constable turned up at his house and when he was rung by the sergeant. On both occasions appellant co-operated and was reached. Therefore the suggestion that the police tried several times to contact Roger Dobbyn, while perhaps true, can't in any way be imputed to appellant's failure to co-operate. A person can't answer a ringing phone or a ringing doorbell if he is not at home.

3. It is clear to appellant that his wife's police report against him was provoked and motivated by a feeling of anger and resentment at finding another woman in the house. While his wife may have claimed to be surprised, considering that he and his wife had de facto separated three years earlier and his wife had left the island to boot, he feels that her surprise was unrealistic and contrived, calculated to impress the police and elicit sympathy from them and from the court and primarily to get back at appellant. It was he, rather, who was surprised and his wife took full advantage of his surprise.

In fact, without prejudice to the previous grievances regarding the date of the incident, the phone call which is referred to in the affidavit, (which allegedly took place between Mr and Mrs Dobbyn, on the 10th February 2010), would have taken place very soon (minutes) after the appellant found out from his partner that his wife was in Malta. Hence even if one concedes that the phone call

did in fact take place and that Mr. Dobbyn did in fact tell his wife that she could not stay for obvious reasons, one must contextualize the phone call and put it in its proper perspective and proper time frame. One can readily imagine the unfortunate and awkward situation that appellant suddenly found himself in, in a deep state of shock, caught unawares, on the other end of a telephone line. Reconciliation was never an option which the parties had considered or had given any thought to and appellant never gave his wife any reason to believe otherwise. Had he known that his wife was coming down to Malta beforehand, the situation would have been avoided as then appellant would definitely have made alternative arrangements as he had done in the past, which would have accommodated his wife.

4. Mrs. Dobbyn's deliberate failure to inform her husband raises a lot of questions and puts his wife's good faith and sincerity into question. For all she knew, appellant may have been overseas himself and then what would she have done? Would she have reported him to the police because she was not able to enjoy her home? The crime envisaged in Art. 85 is a serious offence which should not be used and abused by the police and they should certainly should not be manipulated into using this section against unsuspecting individuals who are caught unawares in domestic battles, where there is always more than meets the eye. This section presupposes the existence of a number of elements namely :

- (i) an external act that disturbs a third party in the possession of something which he is enjoying, which act is exercised against the presumed or express opposition of such third party;
- (ii) the belief that such act is being carried out in the exercise of a pretended right;
- (iii) the awareness in the person carrying out the act that he is doing something that should be carried out by a public authority;
- (iv) the absence of title.

To say that appellant's wife was enjoying or had possession of the premises at 303, St. Julians Road,

B'Kara was is farfetched and unrealistic. While it is true that the house belonged to her, she had definitely relinquished the day to day possessory rights and obligations over it and moreover although she may certainly have been entitled to enjoy the house, this right was also subject to certain reasonable obligations namely that she give her husband some reasonable prior notice of her impending visits. Once you leave a country, abandon a home and start a life and set up residence elsewhere, some possessory rights are lost along the way and you are expected to have the decency and good sense to inform the other person of your movements just in case they may have made other plans which need to be factored in also. Her total disregard for her husband's life, her presumption that he should drop everything and accommodate her without any notice, notwithstanding that she had clearly made a life for herself elsewhere which appellant was not a part of, is highly unfair and also very significant and shows a certain "animus".

In the telephone conversation referred to, which took place on 10th February 2010, (not on the 11th February 2010 and not in the preceding months) where appellant allegedly told his wife that she could not stay for "obvious reasons", appellant was definitely not acting in the exercise of a pretended right, but rather was acting as best he could in awkward circumstances, given his state of shock, to minimize any obvious friction that would have ensued between himself, his wife and his partner. Appellant was exercising damage control and moreover was in a deep state of shock himself and therefore the telephone conversation has got to be seen in its proper perspective. Appellant feels that the First Court failed to put the incident in its proper perspective. That being said, appellant however still insists that he never actually refused his wife entry into the house because : he was not at home on the day that she rang the doorbell.

On the date of the incident – i.e. on the 11th February 2010 appellant had no direct (physical or telephone) contact with his wife whatsoever and only saw her at the police station and was even prevented by the police from talking to her.

5. The charge refers to a continuous offence which presupposes the committing of several acts in pursuance of the same design. Considering that appellant did not come into contact with his wife at all on the 11th February 2010, nor in the preceding months and the only sort of contact he had with her was during one isolated telephone conversation on the 10th February 2010, not only does that exclude the offence, but it most certainly excludes it in its continuous form.

Considers :

That in effect accused is being charged with the exercise of a pretended right in terms of article 85 of Chapter 9 of the Laws of Malta. When on the 11th February 2010 at about 20.00 hours he disturbed his wife Irene Gordon Dobbyn in the possession of her property.

According to the evidence, accused and his wife own the property at 303, St. Julians Street, B'Kara and are at the moment in the midst of separation proceedings that are not yet concluded.

Accused married his wife in 1997 in Florida USA but lived in Malta for some time.

According to the accused his wife left him in 2007 with a container full of belongings. She returned in 2008 and left again. She returned unannounced in February of 2010, went straight to the house and demanded that she be let in.

It was accused's partner who opened the door and not knowing the wife, refused to let her in.

Mrs. Dobbyn phoned accused whilst he was driving and demanded that she either be let in or breakdown the door. Late on that day accused received a note from the Police asking him to go to the Police Station and was later served with this summons charged with the exercise of a pretended right, since the wife claimed that she had only

temporarily left the matrimonial home and demanded that she return.

The defence argued that the wife does not live in Malta, disappeared for two years and just turned up and on the 11th of February 2010 demanding that she enters the matrimonial home.

Accused was not there but his partner was and it was only to be expected that the partner not knowing the wife did not let her in.

The element of possession on behalf of the wife was missing in this case. Although she may have a legal right to the property, she had renounced to its possession in 2007 when she left with a container full of her belongings. What's more accused had no intention of denying his wife her legal rights, but it so happened that he was not at home at that time and could not see to the situation. It was not his fault that his partner refused to let the wife in.

On the other hand the Attorney General made reference to article 85 of the Criminal Code, the arbitrary exercise of pretended rights claiming that that article is a matter of public order and people should not take the law into their own hands.

In order to uphold the first judgement, the Court has to see whether the wife was precluded from exercising her civil rights.

Considers :

Article 85 of Chapter 9 mentioned by the Attorney General deals with the disturbance of "the possession of anything enjoyed by another person, or in any manner unlawfully interfere with the property of another person".

The elements of this crime were very ably set out by Judge William Harding in the case "The Police vs Giuseppe Bonavia et" [Criminal Appeal 14.10.1944 Vol. XXXII part 4 page 768]. These include :

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- a. an external act that impedes another person from exercising a right, which act would have been committed with the explicit or implicit consent of the accused;
- b. the accused would believe that he is acting within his rights;
- c. the knowledge that accused would be taking on his own initiative that which he should take through legal process;
- d. that the act does not involve a more serious crime.

This judgement seems to have widened the scope of article 85 because this article speaks only of possession whilst the judgement implies any other right.

There is no doubt that Mrs. Dobbyn did have a legal right to the property but whether she really had possession at that moment in time is doubted.

This Court has no reason not to doubt the evidence given by accused when he says that the wife left him in 2007 with a container full of belongings and returned to the United States where she has a house.

This act means that Mrs. Dobbyn was voluntarily renouncing to the possession of the property without in any way prejudicing her legal rights over it, which rights are to be determined in the course of separation proceedings pending between the spouses.

This Court is of the opinion that when Mrs. Dobbyn returned on the 10th of February 2010 unannounced and without advising the accused, she did not at that moment in time have possession of the property.

In fact it was the accused who had such possession and his partner who was in the house at that time.

Even though the wife may have testified in the first stages of these proceedings that she had temporarily left the matrimonial home, her acts indicate otherwise.

The fact that she took all her belongings and settled in the United States and did not return to Malta for a substantial period of time indicates that she had voluntarily relinquished the possession of the property. This means therefore that the first element for the existence of this crime is missing.

Whats more, this Court is also of the opinion that the second element, that is the accused believing that he was acting on the basis of a right he had, is missing.

Accused was not present when his wife knocked at his house. He only got to know that she was there when she phoned him on his mobile whilst he was driving and he was not in any position to either prohibit his wife from entering or leaving. In fact it was not him who prohibited entry but his partner who did not recognise his wife and refused her entry to the house.

Accused claimed that all he wanted to do was to seek legal advise to see what his rights were but was not allowed to do so and faced these charges when his wife reported the matter to the Police.

It has always been held that an important element for the existence of this crime is the intentional element, in the sense that accused would have acted that way in the knowledge that he is exercising a right that he thinks he has but is distinct from other crimes like theft or voluntary damages on other people's property.

This means therefore that an investigation is to be held into the motive of the accused behind the act committed. The material element consists in depriving a person from a right over which he/she has a title [Police vs Vincent Cortis – Criminal Appeal 27-11-2008].

For this crime to subsist, there must be a positive act whereby a third party is deprived or disturbed in the possession of something that the third party enjoys.

It has already been stated by this Court that at that stage, on the 10th February 2010 Mrs. Dobbyn did not have the possession of the property. Secondly there was no positive act on the part of the accused that actually prohibited his wife from entering the property. Such a positive act came from his partner who actually physically prohibited the wife from entering. Accused was in no situation or position to do so. He was not in the vicinity, did not communicate with his partner and neither did he give any specific or indirect instructions that the wife be prohibited from entering the premises.

This Court therefore concludes that given that two elements for the crime of arbitrary exercise of pretended rights are missing, accused cannot be found guilty of the charge.

The Court therefore upholds the appeal, reverses the judgement, declares appellant not guilty of all the charges preferred against him and orders his immediate discharge.

< Final Judgement >

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