



MALTA

QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI
MAGISTRAT
AARON BUGEJA

Seduta tas-6 ta' Awwissu, 2014

Numru. 1018/2013

The Police

(Inspector Jason Francis Sultana)

vs

Greta Elena Loredana Mercieca u Ted Miltenburg

The Court after seeing the charges dated 12th October, 2013 in respect of Greta Elena Loredana Mercieca, daughter of Paul and Jacqueline nee` Vassallo, born in Romania on the 7th of May, 1990, residing at Jaccardania, Flat 3, Triq it-Tiben, Swieqi and holder of identity card bearing number 581590M and Ted Miltenburg, son of Teo and Yos nee` Blom, born in Holland on the 23rd of April, 1986, residing at Jaccardania, Flat 3, Triq it-Tiben, Swieqi and holder of Dutch identity card bearing number IP2R8DH53,

- a. And charge them for having on the 12th of October, 2013 in Sliema between 04:30 hrs and 05:00 hrs wilfully committed any spoil, damage or injury to or upon any movable or immovable property belonging to any other person that within the shop

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by the name of Oasis the detriment of its owner which amount of the damage exceed one hundred and sixteen euro and forty-seven cents (€116.47) but do not exceed one thousand and one hundred and sixty four Euro and sixty-nine cents (€1164.69) and this in accordance to Art. 325(b) of Chapter 9 of the Laws of Malta;

- b. Moreover charged with having on the same date, time, place and circumstances caused injuries of slight nature to Raymond Catania holder of identity card number 700955M with a pointed and cutting instrument as certified by Dr. Chris Mercieca Medical registration number 2251 M.D. of Mater Gzira Health Centre and this in accordance of Article 221 of Chapter 9 of the Laws of Malta;
- c. Moreover also charge them for having on the same day, date, place and circumstances in any manner not otherwise provided for in this Code, wilfully disturbed the public good order or the public peace and this in terms of section 338(dd) of Chapter 9 of the Laws of Malta.
- d. Moreover charged with having on the same date, time, place and circumstances pushed Raymond Catania in the street with the object of hurting or insulting such person and this in terms of Section 339(1)(1) of Chapter 9 of the Laws of Malta;

Charging Ted Miltenburg:

- e. Moreover charged with having on the same date, time, place and circumstances threatened Raymond Catania with a pointed and cutting instrument;
- f. Moreover charged with having on the same date, time, place and circumstances, with the intent to commit the crime of very grievous bodily harm on the person of Mark Andrew Horner manifested such intent by overt acts which were followed by the commencement of the execution of the crime of very grievous bodily harm with a pointed and cutting instrument, which crime was not completed in consequence of some accidental cause independent of his will and this in accordance of article 41a, 214 and 216 of Chapter 9 of the Laws of Malta;
- g. Lastly charged with having on the same date, place, time and circumstances had in his possession a pointing and cutting instrument without the licence of the Commissioner of Police.

Having analysed the documents that were exhibited and all the records of the proceedings;

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Having seen that in terms of a formal written accusatory document issued on the 24th June 2014 the Attorney General found that from the preliminary investigation in this case there might result an offence or offences under the provisions of :

- A. With regards both Ted Miltenburg and Greta Elena Loredana Mercieca :
 - a. Article 325(b) of the Criminal Code, Chapter 9 of the Laws of Malta;
 - b. Articles 214, 215 and 221 of the Criminal Code, Chapter 9 of the Laws of Malta;
 - c. Article 338(dd) of the Criminal Code, Chapter 9 of the Laws of Malta;
 - d. Article 339(1)(l) of the Criminal Code, Chapter 9 of the Laws of Malta;
 - e. Articles 17, 31, 532A and 533 of the Criminal Code, Chapter 9 of the Laws of Malta;
 - f. Articles 383, 384, 385, 386 and 387 of the Criminal Code, Chapter 9 of the Laws of Malta;

- B. With regards Ted Miltenburg only : -
 - g. Articles 251 and 251H(g) of the Criminal Code, Chapter 9 of the Laws of Malta;
 - h. Articles 41(a), 214, 215, 216 and 217 of the Criminal Code, Chapter 9 of the Laws of Malta;
 - i. Articles 6 and 51(7) of the Arms Act, Chapter 480 of the Laws of Malta;

And decided in terms of Articles 370(3)(a) of the Criminal Code to send the accuseds for trial by this Court subject to no objection being made by the accuseds in accordance with Article 370(3)(b)(c)(e) of the Criminal Code.

Having seen that during the sitting held on the 6th June 2014 and on the 18th July 2014 the Prosecuting Officer declared and reiterated that the Prosecution had no further witnesses to produce and that it was resting its case. During the same sitting of the 18th July 2014, in terms of Article 370(3)(b) of the Criminal Code, the Court, after reading out the contents of the formal accusatory document to the accuseds, requested the accuseds whether they or any one of them found any objection to their respective cases being dealt with summarily. After giving the accuseds a reasonable time within which to reply, the accuseds, after consulting their Legal Counsel both declared that they had no objection to their case being dealt with summarily. The Court therefore took note of this declaration in writing in the records of these proceedings in terms of Article 370(3)(c) of the Criminal Code.

Having seen that after that the accused Greta Elena Loredana Mercieca produced the testimony of Paul Mercieca, both accuseds declared that they did not have any further witnesses to produce and the Defence declared that it was resting its case.

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Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel to the accuseds the Court adjourned this case for judgment in terms of Article 377 of the Criminal Code.

This Court considered that : -

During the oral submissions the Defence conceded that the Prosecution managed to prove the first charge (a) and the third charge (c) beyond a reasonable doubt.

This Court, after analysing the evidence produced agrees with these submissions and finds that the Prosecution managed to prove the first charge (a) and the third charge (c) proffered by the Attorney General beyond reasonable doubt.

As for the first charge (a) the Court notes that the Attorney General mentions Article 325(b) of the Criminal Code as the article of the law creating the offence. In reality this Article ought to read 325(1)(b) of the Criminal Code. However given the concession made by the Defence as well as the fact that this seems to be a *bona fide lapsus calami* the Court is considering this reference of the Attorney General as a reference to Article 325(1)(b) of the Criminal Code and therefore it is proceeding accordingly.

Charge b : - Articles 214, 215 and 221 of the Criminal Code against both accuseds

This Court finds that from the evidence produced the Prosecution failed to prove beyond reasonable doubt that the accused Greta Elena Loredana Mercieca was guilty of this offence given that the witnesses do not mention any involvement on her end in relation to the slight bodily harm suffered by Raymond Catania in this case. It may be argued that she might have precipitated the incident, but certainly not the guilty party in this case. On the basis of the evidence produced by the Prosecution, the Court finds her not guilty of this offence.

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As for the other co-accused Ted Miltenberg the situation is more complex.

From the medical certificate exhibited at folio 10 and the testimony of Dr. Chris Mercieca it transpires that Raymond Catania suffered : -

- (a) A 3 cm cut on his right thumb that had to be sutured;
- (b) A 30 cm long scratch on the abdomen (“fuq iz-zaqq”) of Raymond Catania.

Both injuries were classified by this medical practitioner as being slight with reservations. During his testimony this physician confirmed that these reservations were registered on account of the fact that the incised wound on the right thumb could leave a scar. In both cases the injuries were deemed compatible with a sharp instrument.

Defence Counsel argues that the victim Raymond Catania testified that he did not know how these injuries came about and that he only knows that at a point in time while there was this argument going on between the accused and himself, he realised that he had blood. However he does not confirm whether at any time was he attacked by anyone with a knife and he was completely unaware as to how these injuries were sustained. While the evidence points towards Raymond Catania injuring his thumb while picking up a broken glass from the floor, there was a complete void in relation to the 30cm scratch on his abdomen.

This Court considers this interpretation as partially correct. It is true that the recollection of the incident by Raymond Catania is not clear. At folio 36 he stated clearly that he was not in a position to be precise given that all happened in a short while during the heat of the argument. However there are parts in his testimony which point towards a physical confrontation or at least a physical contact between Ted Miltenburg and himself. At folio 35 he mentions that he pushed Greta Mercieca out of the shop and it was then that Miltenburg stood up and told Catania not to touch his “wife”. However he does not stop at that given that at one stage he mentioned that he pushed both of them. He says “bdejt nimbuttahom” – Maltese expression in the plural form, and not just in its singular form. Catania remembers seeing Miltenburg with a knife in his hand after that Miltenburg took hold of a chair against him.

The confirmation that there was physical contact between Catania and Miltenburg comes from witness Raymond Scerri who witnessed the incident almost from the start. At folio 60

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Scerri states that Miltenburg was challenging Catania to hit him and Scerri tried to dissuade Catania from reacting against Miltenburg. However at one stage Scerri says that :

I tell him listen don't do these things because he is trying to make you hit him and then it comes everything against you stay there and when he see that he didn't hit him he get the chair and threw it at him my friend.

Scerri adds that Miltenburg took the chair from outside the shop, hurled it towards Catania, hit and caused damage to the "blackboard" inside the shop and various articles fell to the floor in consequence.

Meanwhile, Greta Mercieca went behind the bar and started dropping the articles that were on the bar table, including knives, forks, glasses etc on the floor. Scerri and Catania went to pick them up. When Catania took hold of a knife from the floor (see Catania's testimony at folio 36 and Scerri's at folio 61) Miltenburg took a knife from one of the restaurant tables :

When he saw him pick up things, he get the knife from the table and say you try to pinch me, and I tell him nobody try to pinch you, put the knife there, he is picking what your girlfrined threw.

At this point therefore Miltenburg was holding a knife in his hand.

In the meantime, Scerri says that while this was happening Catania "cut his hands with a glass or with something here".

However Scerri adds also the following crucial words :-

And when he come, **he hit him with the knife** and then come one from the Mc Donalds and he try to stop him as well. (Emphasis added – see folio 61).

This witness here is referring to the action of Miltenburg who hit Catania with the knife he was brandishing. Indeed this witness therefore confirms not only that there was contact between Catania and Miltenburg, but also confirms that Miltenburg at the end of the day did in fact hit Catania with the knife. At folio 72 Scerri categorically stated that this knife

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was not pointed and it was normal and "in front it has teeth to cut for the meat and these things".

At folio 72 Scerri confirms and reiterates that he thinks Catania cut his thumb while picking glass from the floor – so much so that he asserts that

I saw the glass, the big glass, the feet of the glass and it was broken and it was with blood. That is why I think that he cut.

At folios 75 and 76 Scerri reconfirms that Miltenburg took the knife from a restaurant table and was not carrying it before this incident : -

He did not took the knife from his pocket, because I saw him taking it from the table and make like this.

Witness Kenneth Zammit's recollection of events is similar to that of Raymond Scerri. At folio 80 this witness confirms that after Greta Mercieca fell to the ground, Miltenburg went inside the shop and :

he tried to fight with Ray (Catania). They started the argument. I myself put him out, I pushed him out from his back and when I pushed him out of the cafeteria, he threw a chair to Ray.

Then he recounts Greta Mercieca throwing "everything she saw" to the ground including cutlery. Then after throwing the chair towards Catania, at folio 81 Zammit adds that Miltenburg:

went towards Ray (Catania) and he told me you do don't fuck with me, you don't fuck with me. At that time, exactly at that time, that I saw the stake knife in his hand I was in front of Mc Donalds because I came out off the argument and I called the police myself. I told them that there was an argument and that a knife was involved.

This sequence of events tallies with the recollection of both previous witnesses. It also corroborates the version of Scerri in that Miltenburg went back inside the premises for confrontation with Ray Catania brandishing a knife in his hands. Then Scerri confirms that apart from branshing it, Miltenburg used it by hitting Catania with it.

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Whatever the form of this knife, when this Court pieces together the direct testimony of these eyewitnesses principally that of Raymond Scerri above quoted, together with the indirect evidence provided in this case, including the medical certificate exhibited at fol 10 and the testimony of Dr. Chris Mercieca at fol 140, it is morally convinced that Ted Miltenburg did not cause the injury to Ray Catania's thumb, but he did cause the 30cm scratch on Catania's abdomen. Consequently this Court is going to find Ted Miltenburg guilty of causing slight bodily harm on the person of Raymond Catania caused by a cutting or pointed instrument.

Charge d : - Article 339(1)(l) of the Criminal Code, Chapter 9 of the Laws of Malta;

This Court finds that the submissions made by the Defence Counsel in relation to this charge are correct. This is the contravention of a person who pushes against any person in the street with the object of hurting or insulting such person. There is no evidence tending to show that the co-accuseds or any one of them committed this contravention in this case. At worst it was the other way round in the sense that it was the Prosecution witnesses who tried to push the accuseds out of the shop to the street.

Charge g : - Articles 251 and 251H(g) of the Criminal Code, Chapter 9 of the Laws of Malta;

The Court notes that this charge was not originally proffered by the Police in the summons. The Police charged the accused with having on the same date, time, place and circumstances threatened Raymond Catania with a pointed and cutting instrument. The Court does not consider the facts on which this charge is based as reflecting the elements of Article 251 of the Criminal Code that criminalises the act of whosoever uses violence in order to compel another person to do, suffer or omit anything.

This notwithstanding and without prejudice to the above, the Court finds that from the evidence produced, even though violence was exercised (within the parameters mentioned

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earlier on), the Prosecution failed to prove beyond reasonable doubt **all** the elements of this offence and therefore it cannot safely and satisfactorily find guilt in relation to this offence.

Charge h : - Articles 41(a), 214, 215, 216 and 217 of the Criminal Code, Chapter 9 of the Laws of Malta;

The evidence produced in this case shows beyond reasonable doubt that at one stage Miltenburg did take hold of a chair and hurled it towards Raymond Catania. The Court is also morally convinced that Miltenburg did take hold of a knife and used it to cause slight bodily harm on the person of Raymond Catania. These facts, coupled by the other evidence that transpires in this case relating to the progression of this incident, in principle, could also integrate this offence as proffered by the Attorney General.

However this Court finds that in the circumstances it would not be safe and satisfactory to find the accused Miltenburg guilty of this offence not because its elements have not been proved; but because the Police charged Miltenburg with attempting to cause “very grievous bodily harm on the person of Mark Andrew Horner”. This Court could find no trace of this Mark Andrew Horner being in any way involved in this case – not even as a customer of this restaurant happening to be at the wrong place at the wrong time or at least a passerby in the same circumstances.

The Court deems that the formal accusatory document issued by the Attorney General has to be read in conjunction with the charges proffered by the Prosecution in their summons. The Prosecution had ample possibility to bring evidence relating to this Mark Andrew Horner being involved in this case, but it did not.

Moreover if this Mark Andrew Horner simply happens to be totally extraneous to this case on account of him being mentioned in the charge sheet by mistake, the Prosecution could have requested the correction of the charge sheet thereby rectifying the situation. None was carried out during the appropriate stages of these proceedings.

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Consequently this Court cannot serenly find the accused Ted Miltenburg guilty of this offence in the given legal and factual state of the charge sheet and formal accusatory document coupled by the evidence produced in this case.

Charge i : - Articles 6 and 51(7) of the Arms Act, Chapter 480 of the Laws of Malta;

Article 6 of the Arms Act states that :-

Saving the provisions of article 8 no person shall carry outside any premises or appurtenance thereof, a knife or cutting or pointed instrument of any description without a licence or permit from the Commissioner.

Article 8 of the same Arms Act adds that :-

Notwithstanding the other provisions of this Act or of any other law, no licence shall be required for the purpose of possessing or keeping inside any premises a knife or a cutting or pointed instrument not being a prohibited weapon in terms of article 3 or for acquiring such a knife or instrument for the same purpose.

The evidence shows that the knife used by Ted Miltenburg was not a prohibited weapon such as a flick knife, gravity knife or a butterfly knife. It was a knife that he found standing on a table that he took it up. Prosecution witness Raymond Scerri confirms that the accused Miltenburg was not carrying this knife in his pocket. He found it on a table there and took hold of it in the course of this incident.

The Court does not find that these facts fall within the parameters of the prohibition prescribed by Article 6 of the Arms Act and is therefore going to declare Ted Miltenburg not guilty of this offence.

Decide :-

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Consequently, this Court, after having seen Articles 17, 31, 41(a), 214, 215, 216, 217, 221, 251, 251H(g), 325(1)(b), 338(dd), 339(1)(l), 383, 384, 385, 386, 387, 532A and 533 of the Criminal Code, Chapter 9 of the Laws of Malta as well as Articles 6 and 51(7) of the Arms Act, Chapter 480 of the Laws of Malta, (as mentioned by the Attorney General in his written formal accusatory document at fol 143) finds and declares :

- A. Greta Elena Loredana Mercieca not guilty of the charges (b), (d), (e) and (f) (charges marked (e) and (f) not being accusations in terms of law given that they expound legal principles and powers granted to the Court as well as consequences that might arise in the case of finding of guilt and do not reflect Articles of the Law creating offences that could form the basis of a conviction by a court of criminal jurisdiction). On the other hand, this Court finds her guilty of the charges marked with letters (a) and (c).

In the circumstances, in relation to charge (a) having also seen that the damages caused and indicated at folio 135 have been paid in full (this being declared without prejudice to any other claim for damages competent to others resulting from this case), the Court is of opinion that, in line with the provisions of Article 22 of Chapter 446 of the Laws of Malta, having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment in relation to this offence, and the Court is therefore making an order discharging the offender subject to the condition that she commits no offence during the next one year and this order is being made after that the Court explained to Greta Elena Loredana Mercieca in ordinary language that if she commits another offence during the period of conditional discharge, she will be liable to be sentenced for the original offence;

In relation to charge (c) the Court is condemning Greta Elena Loredana Mercieca to an ammenda of thirty euro (E30).

- B. Ted Miltenburg not guilty of the charges (d), (e), (f), (g), (h), (i) (charges marked (e) and (f) not being accusations in terms of law given that they expound legal principles and powers granted to the Court and consequences that might arise in the case of finding of guilt and do not reflect Articles of the Law creating offences that could form the basis of a conviction by a court of criminal jurisdiction). On the other hand the Court is finding him guilty of the charges marked with letters (a), (b) and (c).

In the circumstances, in relation to charge (a), having seen also that the damages caused and indicated at fol 135 have also been paid in full (this being declared without prejudice to any other claim for damages competent to others resulting from this case), the Court is of the opinion that, in line with the provisions of Article 22 of Chapter 446 of the Laws of Malta, and having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment in relation to this offence, and therefore the Court is making an order discharging the offender subject to the condition that he commits no offence

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during the next one year and this order is being made after that the Court explained to Ted Miltenburg in ordinary language that if he commits another offence during the period of conditional discharge, he will be liable to be sentenced for the original offence.

On the otherhand, in relation to charge (b) the Court is condemning Ted Miltenburg to two months imprisonment. However the Court orders that this sentence shall not take effect unless during a period of one year Ted Miltenburg commits another offence punishable with imprisonment and thereafter the competent court declares and orders under Article 28B of the Criminal Code that the original sentence shall take effect. Furthermore the Court explained to Ted Miltenburg in ordinary language his liability under Article 28B of the Criminal Code if during the operational period he commits an offence punishable with imprisonment.

In relation to charge (c) the Court is condemning Ted Miltendburg to an ammenda of thirty euro (E30).

Moreover, after having seen Article 383 of the Criminal Code, the Court, in order to provide for the security and safety of Raymond Catania and for the keeping of the public peace, in addition to the punishment applicable to the offences abovementioned, requires Ted Miltenburg and Greta Elena Loredana Mercieca to enter into their own recognisance to the sum of one thousand euro for a period of one year.

Furthermore, given that during the course of these proceedings no expert or referee was appointed the Court abstains from taking further cognisance of the request to condemn the co-accuseds for the payment of costs in connection with the appointment of experts.

Moreover, in light of the fact that the damages proved in this case have been paid in full the Court is abstaining from implementing the order under Article 532A of the Criminal Code.

Delivered today the 6th August 2014 at the Courts of Justice in Valletta, Malta.

< Sentenza Finali >

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