

In the Court of Magistrates (Malta)

as a Court of Court of Criminal Judicature

Magistrate Dr Aaron M. Bugeja M.A. Law, LL.D. (melit)

The Police

vs

Alexander Ferdinand Vit

The Court after seeing the charges issued against **Alexander Ferdinand Vit** holder of German identification card number LF4P02K49 whereby he was charged with having in his name and on behalf / representing M.C.M. Maintenance Centre Malta Limited (C-45792) of Office 692, Mezzanin Level, Arrivals Hall, Malta International Airport, Luqa that between 31/01/2015 and 01/02/2015 at Park 8 situated at the Malta International Airport :-

(a) without intent to steal or to cause any wrongful damage but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, took and carried away two aircraft generators costing seven thousand two hundred seventy two Euro fifty eight cents (E7272.58) from Libyan Air Ambulance 5A-DRL for the expense of the Ministry of Health (Ambulance and Emergency) of Ain Zara Area, P.O. Box 7620, Tripoli, Libya;

(b) Also at the same date, place and time have caused damage on aircraft 5A-DRL to the detriment of plaintiffs which exceed the sum of two hundred and fifty euro (Euro250)

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

Having seen that during the sitting of the 29th May 2015 the Prosecuting Officer confirmed the charges on oath.

Having seen that during the examination of the accused in terms of Article 392 and 370(4) of the Criminal Code the accused declared that he found no objection to his case being dealt with summarily.

Having also seen that the Attorney General declared by means of a note exhibited at fol 20 that he granted his consent to this case being dealt with summarily;

Having seen that the accused, in reply to the question posed by the Court in terms of Article 392(1)(b) of the Criminal Code, declared that he was not guilty;

Having heard all the witnesses produced and seen the records of the proceedings;

Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel to the accused and the parte civile;

Considers the following : -

According to Article 85 of the Criminal Code : -

85.(1) Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person, or demolish buildings, or divert or take possession of any water-course, or in any other manner unlawfully interfere with the property of another person, shall, on conviction, be liable to imprisonment for a term from one to three months: Provided that the court may, at its discretion, in lieu of the above punishment, award a fine (multa).

(2) The provisions of article 377(5) shall apply in the case of any conviction under subarticle (1) and when the conduct of the offender has resulted in a person being despoiled the Court shall apply the provisions of that subarticle in order to ensure that the person despoiled is fully re-vested in the position before he was despoiled.

This Article finds its roots in Article 168 of the *Leggi Penali del Codice pel Regno delle Due Sicilie*. This Article prescribes the crime of *vie di fatto* and follows : -

Chiunque senza oggetto di furto o di recar danno per ingiuria, ma solamente per l'esercizio di un preteso diritto, obblighi altri al pagamento di un debito, o alla soddisfazione di un'obbligazione qualunque, o disturbi un'altrui possesso, demolisca fabbricati, devii acque e simili, e' punito col primo al secondo grado di prigionia, salve le pene maggiori nel case di un reato per se stesso maggiore.

Article 85 is practically identical to this Article of the *Leggi Penali del Codice pel Regno delle Due Sicilie*. This means that Article 85 of the Maltese Criminal Code can be interpreted in line with the jurisprudence and case law governing this Article of this defunct Code.

In the case *Il-Pulizija versus Eileen Said* decided by the Court of Criminal Appeal on the 19 th June 2002 Mr Justice Joseph Galea Debono stated :-

Illi l-appellanti instabet hatja tar-reat ta' "ragion 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 civili u dak kriminali, tant li Sir Andrew Jameson meta kien qed jigi abbozzat il-Kodici Penali Malti kien osserva fir-Rapport tieghu 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 Speċjali) Vol. II).

Maltese Courts have interpreted Article 85 of the Criminal Code both in line with the Laws of the Kingdom of the Two Sicilies as well as on the lines discussed by Carrara, commenting on the Code of Criminal Laws of the Kingdom of Italy. This Code prescribed the crime of *ragion fattasi* as follows :-

286. Chiunque con violenze verso le persone, ed al solo oggetto di esercitare un preteso diritto, taluno a pagare un debito, o ad eseguire un' obbligazione qualunque, o, turba l'altrui possesso, demolisce fabbricati, devia abbatte alberi, siepi vive o ripari stabili sarà, punito :

1. Colla relegazione estensibile ad anni dieci, se, la violenza sarà, stata fatta con armi ed'accompagnata da percossa o ferita;
2. Col carcere non minore di tre mesi, se si sarà fatto uso d'armi, ma senza percosse nè ferite ovvero se siano intervenute percosse o ferite, ma senz'armi;

3. Col carcere estensibile a tré mesi, se 'la violenza sarà seguita senza percossa o ferita e senza armi.

Alla pena del carcere sarà aggiunta una multa estensibile sino al doppio del danno recato.

Sono salve in tutti i casi le maggiori' pene pei reati per se stessi più gravi.

287. Se la demolizione di fabbricati, o la deviazione d'acque, o l'abbattimento di alberi, siepi vive o ripari stabili, fu bensì commessa allo scopo di esercitare un preteso diritto, ma non v'ebbe violenza verso le persone, il colpevole sarà punito con una multa non maggiore del doppio del danno recato.

Carrara describes this crime as :

La ragion fattasi (1) e' il delitto di chiunque – credendo di avere un diritto sopra altro individuo lo esercita malgrado la opposizione vera o presunta di questo, pel fine di sostituire la sua forza privata all'authorita' pubblica, senza per altro eccedere in violazione speciali di altri diritti.

On the otherhand, the elements of this crime, according to the same author are : -

1.o Un *atto esterno* che spogli altri di un *bene che gode*, e sia eseguito contro la opposizione o espressa o presunta di questo – 2.o *Credenza* di far quest'atto in esercizio di un diritto – 3.o *Coscienza* di fare di privato braccio quello che dovrebbe farsi per *autorita'* di magistrati – 4.o *Mancanza di titolo piu' grave*.

While Article 85 of the Maltese Criminal Code and the corresponding Article in the Code of the Kingdom of the Two Sicilies are not identical to their modern Italian counterpart, the formal element is the same. However the Italian Criminal Code requires *ragion fattasi* to be accompanied with some form of violence.

Both the Maltese Code as well as that of the Kingdom of the Two Sicilies do not require an element of violence in order for the crime of *ragion fattasi* to take place. However apart from violence, both this defunct

Code as well as its modern Italian counterpart are based on elements that were also elaborated by Maltese Courts both in their older judgments such as that delivered by Mr. Justice William Harding in the case *Il-Pulizija vs. Giuseppe Bonavia et* (App.Krim. 14.10.1944 , Vol.XXXII - IV , p.768) as well as the more recent case decided by Mr. Justice Lawrence Quintano in the case *Il-Pulizija vs Anthony Zahra* of the 20th June 2014 that reflect the elements explained by Carrara.

In order for this crime to be committed an injured party must prove to have some form of possession. This possession was also interpreted to include mere detention of a movable. It only requires that the accused's action disturbs the status quo by means of his unilateral action without having prior recourse to the remedies awardable by the judicial authorities. This means that the accused *si e' fatto arbitrariamente ragione* and not simply *si e' fatto ragione da se'*. In a case decided by the Italian Court of Cassation Sez. VI, sent. 11118 of the 22/11/1985 *Mioli* it was held that this crime of *ragion fattasi* is not meant to punish *chi si fa ragione da se' ma chi si fa arbitrariamente ragione* such that there is disturbance of the status quo prevailing at the time when the criminal offence is committed.

According to **Carmignani**, the disturbance of the possession does not only have to be constructive in nature but it has to be actual. This has to be accompanied with the disturbance of the status quo : -

879 Si hanno esempi di questo delitto, 1. Se un creditore riscuote con violenza dal suo debitore la somma dovutagli; 2. Se una cosa mobile od immobile creduta propria vien tolta violentemente a chi ne e' in attuale possesso; 3. Se un colono, finita la locazione, ricusa di lasciare il fondo;....

This Court is therefore duty bound to analyse whether the injured party had an actual possession of the effects despoiled and what was the status quo affecting this possession at the time of the commission of the criminal offence.

Furthermore, according to **Arabia**, the crime of *ragion fattasi* is not meant to punish disturbance of possession per se but is meant to punish the usurpation of the power vested in the Courts of Justice as a consequence of the accused's unilateral action :

Il che da una parte dimostra che il reato non sta' nella turbativa del possesso, ma nell'uso de' *mezzi dell'autorita' pubblica*. Ma perche' intervenga l'autorita' pubblica a porre in atto l'esercizio dell'altrui diritto, sono fuor di dubbio necessariamente due cose, a) che il diritto sia reale, b) che ne sia controverso l'esercizio.

Furthermore, this crime does not take place when the injured party was and remained in the actual possession of a movable. In paragraph 2851 of his work, Carrara states that "*qui continuat non attentat*" :-

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 degl'interessati, o per decreto dell'autorita' giudiziale.

This is also reflected in more recent Italian jurisprudence :-

Si e' conseguentemente precisato che ... autore del delitto puo' essere soltanto chi non si trova nel possesso della cosa, poiche solo in tal caso si puo' verificare quella turbativa nel godimento di fatto che costituisce uno degli elementi essenziali del reato (tra le piu' recenti, Cass. VI 13.11.81, Papa, G PEN 1982, II, 648; Cass. VI 7.5.85, Spallina', CP 1986, 1766; Cass. VI 26.3.85 Pirola, CP1986, 1935). In effetti, soprattutto dalla circostanza che il diritto deve essere <presteso> si ricava come gli elementi sopra indicati descrivano innanzitutto come presupposto del reato l'esistenza di un conflitto di pretese, ovvero il requisito della contenziosita' del diritto.

However apart from the above, according to Arabia, there has to be some form of controversy between the parties. He adds :

Ma che s'intende per dritto posto in controversia? Ogni dritto il cui esercizio e' chiaramente e solennemente controvertito, sia con un fatto giudiziale, sia con un fatto materiale, che l'altro avea dritto almeno apparente di fare. Si supponga p.e. che Tizio abbia concesso a Caio la facolta' di passare pel suo fondo per certo tempo e con certe condizioni. Se essi venissero in controversia sull'esercizio di questa facolta', e Caio citasse Tizio innanzi al magistrato per farsi conservare nel diritto di passaggio, Tizio incorrerebbe nell'art. 168 se facesse qualche opera per cui il passaggio fosse turbato. Abbia o non abbia diritto, viola la legge facendo cio' si spetta all'autorita' pubblica gia' invocata. Per lo contrario, se prima che Caio adisca il magistrato, Tizio pone una siepe o un cancello o altro segno visibile, che chiaramente pone in controversia la facolta' di Caio, questi incorre nell'art. 168, se invece di adire il magistrato, rompe la siepe o il cancello e passi, abbia o non abbia diritto. Nel che notisi che il porre il cancello che fece Tizio puo' essere ingusto, e quindi una turbativa del possesso di Caio, ma egli non puo' essere astretto che con la sole azione civile, perche' quando pose il dette cancello, non dove' distruggere alcun segno visibile del possesso di Caio, onde e' presunta buona fede, non essendovi stata controversia di cui vi siano segni tali, che tolgano ogni dubbio sulla volonta' dell' altro di contraddirgli il possesso, onde si debba aver ricorso all'autorita'. Gli elementi dunque del reato dell'art. 168 sono a) uno de' datti materiali in esso descritti, e tassativamente nominati, cioe' costringere a pagare un debito, turbare il possesso ec. b) che cio' sia fatto per l'esercizio di un dritto messo in controversia e cosi' che sia richiesta l'opera dell'autorita' pubblica a deciderla, poco importando se questo dritto sia o non sia reale; solo che sia chiaramente controvertito.

Moreover, other more recent Italian case law established that this offence is deemed to take place also when :-

(i) the accused proves to have a right on a movable and that he has an interest to preserve this right; and

(ii) the accused acts on the basis of the fact that he knows that he enjoys this right; and

(iii) that instead of having recourse to the Courts, the accused decides to act unilaterally without obtaining prior judicial authorisation (see Cass., 26 aprile 1974, Ciucci, in Cass. pen, Mass. Ann., 1975, 766; giust. Pen., 1976, II, 407; Cass., 3 giugno 1980, Tornello, in C.E.D. Cass., n. 146137).

An essential element of this crime is based on the *fumus boni iuris* which prompts the accused to act unilaterally in a manner against the law without following the judicial process (see :- Cass., 17 ottobre 1957, Longo e altro, in Riv. Pen., 1958, II, 703; Riv. It. dir. proc. pen., 1958, 843).

Considers further :-

The facts of this case, analysed in the light of the above case law, leave no doubt in the mind of this Court that this is a text book case of *ragion fattasi*. The Prosecution proved beyond a reasonable doubt that the accused knew that his company had an outstanding financial claim against the owners of the aircraft in question as well as that the accused

unilaterally decided to take matters, and consequently the law, in his own hands in order to try to force the hands of the aeroplane's owners to come to terms.

The Prosecution proved beyond a reasonable doubt that prior to filing for the arrest of the aeroplane in question the accused gave orders to his employees to dismantle the aeroplane's engine generators, fully knowing that by so doing this aeroplane would be grounded. This was made before he filed for judicial action against the owners of the aeroplane.

This unilateral action of the accused disturbed the status quo relating to the possession of the aeroplane on the part of its owners as it deprived the injured party from their rights to operate the aeroplane. This action was motivated by the fact that the accused claimed that the owners of the aeroplane had an outstanding debt with his company in relation to works that were separate and distinct from the aeroplane's engine generators.

This unilateral action on the part of the accused was meant to force the owners of the aeroplane to come to a settlement. Indeed in so doing the accused :-

(a) without intent to steal or to cause any wrongful damage, but

(b) only in the exercise of a pretended right (that is the right to get paid his alleged dues),

(c) of his own authority (given that he resorted to this unilateral action first, that is before seeking judicial remedies)

(d) tried, by means of his action, to compel another person to pay his debt or to fulfil any obligation whatsoever (indeed it was proved beyond a reasonable doubt that there was a dispute between the accused and the aeroplane's owners relating to amounts allegedly due by the latter to the accused's company),

(e) disturbs the possession of anything enjoyed by another person or unlawfully interfered with the property of another person (by dismantling the aeroplane's engine generators).

In the light of the above, this Court considers that the Prosecution managed to prove this first charge beyond a reasonable doubt.

Considers further : -

The Prosecution however failed to prove the second charge beyond a reasonable doubt. No evidence of direct damage to the aeroplane as a consequence of the unilateral act of the accused was proved.

Decide

Consequently, this Court, after having seen Articles 85 and 325 of the Criminal Code finds the accused not guilty of the second charge and therefore acquits him from the same charge. At the same time the Court finds the accused guilty of the first charge; however having regard to the circumstances of the case including the nature of the offence and the character of the offender, is of the opinion that it is inexpedient to inflict punishment, and after having seen Article 22(1) of Chapter 446 of the Laws of Malta, the Court is imposing an order discharging the offender subject to the condition that he commits no offence during a period of six months from the date of this judgment.

Furthermore, after having seen Article 22(3) of Chapter 446 of the Laws of Malta, the Court declares to have explained to the offender in ordinary language that if he commits another offence during the period of conditional discharge, the offender will be liable to be sentenced for the original offence.

Delivered today the 31st January 2017 at the Courts of Justice in Valletta, Malta.

Aaron M. Bugeja