



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

**Magistrate Dr. Doreen Clarke LL.D.**

**Today, 17<sup>th</sup> July 2017**

**The Police  
(Inspector Elton Taliana)**

**vs**

**Polina Gutshabes**

**Case Number: 634/2015**

The Court,

Having seen the charges against Polina Gutshabes, holder of passport bearing number P0573515.

Charged with having on the 9<sup>th</sup> August 2015 at about 14:30hrs in Gorg Borg Olivier, St. Julian's, or in the vicinities:-

1. Assaulted or resisted by violence or active force not amounting to public violence, any person lawfully charged with a public duty when in execution of the law or of a lawful order issued by a competent authority;
2. Reviled, or threatened, or caused a bodily harm to a person lawfully charged with a public duty, while in the act of discharging their duty or

because of them having discharged such duty, or with the intent to intimidate or unduly influence them in the discharge of such duty;

3. Disobeyed the lawful orders of any authority or of any person entrusted with a public service, or hinders or obstructs such person in the exercise of his duties, or otherwise unduly interferes with the exercise of such duties;
4. In any manner wilfully disturbed the public good order or the public peace.

Having heard the evidence and the submissions of the parites.

Having seen the acts of the proceedings.

Having considered

This case refers to an incident which took place on the 9th August 2015 at about 14:30hrs on a bus which was close to the St Julians police station after the defendant, a passenger on the bus, refused to leave the bus on being ordered to do so by the driver.

The driver of the bus, Gordon Borda, gave evidence<sup>1</sup>. He stated that on the day in question he was driving a bus on route 12, from Valetta to Bugibba via Sliema and St Julians. When he got to the bus stop which is close to the St Julians Police Station he stopped, thinking that some passengers would be getting off the bus; on stopping however no one got off. At that stop the defendant, together with a man, a child and a pram in which there was a baby, came on the bus. Borda told her that she must close the pram in order for her to come on the bus but she ignored him and pushed her way inside through the people who were standing in the aisle. He called her to pay but she told him that she had already paid and called him *asshole*. At that point Borda got off the bus and he called over two police officers who were close by; these policemen tried to convince defendant to get off the bus but to no avail. They in turn called a female police officer who also came on the bus and even she tried to convince defendant to get off the bus. By that time defendant had sat on one of the seats that had been vacated and she refused to get off the bus and she resisted attempts made by the police officers to get

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<sup>1</sup> Ref deposition at folio 87 et seq of the acts.

her off the bus. Borda continued his testimony by explaining that when the female police tried to pull her by the hand the defendant got hold of her child's scooter and started waving it around; the female police officer tried to take the scooter and a scuffle ensued in the course of which both the defendant and the police officer fell to the ground. When defendant was eventually taken down from the bus the police officers told Borda to proceed on his way; he was also told to call at the police station later to give his version and file a report. On being asked by the Court, Borda said that the man accompanying the defendant did not participate in any way in the argument; the children however were very scared and alarmed at what was happening. Borda concluded his testimony by saying that the man, with the children, went off the bus of his own accord without offering any resistance.

PC730 Shaun Piscopo was one of the police constables who were approached by the bus driver. In his testimony<sup>2</sup> PC 370 explained that he was in front of the St Julians police station when a bus driver approached him and told him that a lady who was on the bus had insulted him and he wanted her to get off the bus. PC 370 called his colleague PC 446 and together they went on the bus. PC 370 was told by the driver that he wanted to press charges against the lady so his colleague asked her to get off the bus and go to the police station. The lady started arguing so PC 446 told him to call a female police officer; PC370 in fact called WPS 304 Lorna Pulis. WPS 304 came on the bus and asked defendant to get off the bus and go with them to the police station, but defendant refused and started raising her voice. PC 370 continued by saying that when WPS 304 tried to arrest defendant she resisted, called the police sargeant a *bitch* and even kicked her in the chest. He also said that the sargeant tried to avoid using violence but it was only after a hassle that she managed to arrest defendant. Under cross-examination PC 370 clarified that when he and his colleague went on the bus there was nothing going on; he spoke to the the bus driver who was sitting in his seat whilst his colleague went to speak to the defendent after the bus driver pointed her out to them. At the time defendant was seated and nothing was going on in the bus. PC 370 also stated that he could not hear the conversation between his colleague and defendant but he could hear defendant raise her voice. PC 370 also admitted in cross examination that when WPS 304 got defendant off the bus he ordered her husband to get off the bus as well with the result that defendant's two small infant childfren

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<sup>2</sup> At folio 63 et seq of the acts.

were left on their own on the bus. Eventually the children were brought to the police station by PC 446.

In his testimony<sup>3</sup> PC 446 Joseph Mifsud explained that when he and his colleague went on the bus he asked the driver what had happened; he then instructed his colleague to take the driver's particulars and the driver to go to the Qawra Police Station<sup>4</sup> to make an official report. PC446 then approached the defendant and told her that she had to go to the Police Station with them *"so that they can make an official report"*. Defendant refused to get off the bus so he told her that that if she was not going to get off the bus he was going to call the sargeant and that necessary force will be used to get her off the bus. The sargeant was called but still defendant refused to get off the bus. At a certain point PC 446 intervened again telling defendant that this was *"just a small problem"* and that she should get off the bus; he also tried to remove a scooter which was in front of defendant. PC 446 continues his testimony by saying that at that point defendant became aggressive and she attacked the sargeant, so he helped the sargeant by restraining defendant. Defendant was taken off the bus by the sargeant, followed by her husband. Since there were the children on the bus PC 446 stayed on the bus and eventually took them to the police station.

WPS 304 Lorna Mifsud, also gave her version of events<sup>5</sup>. She explained that when she went on the bus, after having been called by her colleagues, she told defendant that she had to get off the bus because the bus driver wanted to press charges against her. At a point the police constable removed the scooter and defendant became aggressive punching and kicking the sargeant whilst saying the words: *"bitch I'll kill you"* and resisting. In view of this the sargeant informed defendant that she was under arrest and defendant kept resisting until she was taken to the police station. Under cross examination WPS 304 confirms that when she went on the bus defendant was seated quietly and nothing was happening. In her testimony WPS 304 also explained said that in the course of the altercation she suffered some injuries and she produced a medical certificate showing that she suffered multiple scratches on her left forearm with skin loss as well as trauma and laceration on her left ring finger. These injuries were classified as slight<sup>6</sup>.

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<sup>3</sup> At folio 90 et seq of the acts.

<sup>4</sup> The bus had to stop at Qawra.

<sup>5</sup> Her first deposition at folio 39 et seq, and the second part of her cross-examination at folio 126.

<sup>6</sup> Ref medical certificate at folio 14 of the acts; photos of the injuries are also exhibited as Doc LM1 at folio 58.

The defendant gave evidence. She explained that on the day of the incident she, her husband and their two children (then aged two and five) boarded a bus at St Julians; the younger child was in a push chair. The driver did not want them on the bus claiming that there was no space for the push chair however her husband proceeded into the bus, which she claims was half empty, and found enough space for them and the push chair. In the meantime defendant stayed in the queue to pay. An other issue arose when she was paying because the driver kept insisting that they had to get off, however defendant, adamant not to leave the bus, swiped the bus cards for two of them and tried to pay the other fare using money. The driver refused to accept the money so defendant walked into the bus, thinking that everything was settled. However soon after the driver called her to pay so she went back, gave him the money for one fare (since the others had been paid by card) but he insisted that she should pay for the three of them (the youngest child does not pay any fare). At that point an other argument ensued regarding payment and she called him "*asshole*". On hearing those words the driver started to scream at her and he told her that he was going to get the police and that they would make her get off the bus. Eventually the driver came back on the bus with two police officers; they were talking in Maltese (which defendant does not understand) and looking at her and her family. The police officers then went up to them and asked them to leave the bus; she told them that they were not going to leave the bus but if they had any questions they would answer them on the bus. The police officers did not give any reason why defendant and her family were being asked to leave the bus (although defendant enquired) and kept insisting that defendant should leave the bus; defendant on the other hand kept insisting that she would not get off the bus. Eventually one of the police officers got off the bus and came back with a female police sergeant. The sergeant was more aggressive than the other two officers and when defendant's husband tried to explain the situation she told him to shut up because she was not speaking to him. A lot of arguing followed and one of the constables grabbed the scooter; defendant reacted by grabbing the bag that was hanging on the scooter and a pull push ensued. At a point defendant's husband also grabbed the scooter so she let go of it and it was then that the sergeant grabbed defendant's arm and the other constable grabbed defendant's husband. Defendant realised that if she and her husband were going to be dragged out of the bus her children would be left on their own so she started screaming that she wanted to take her kids. Defendant's recollection from this point onwards is rather hazy; she remembers being hysterical screaming for her

kids whilst being dragged out of the bus and ending up on the floor on the pavement once out of the bus. When she was on the floor the sargeant was trying to handcuff her and the struggle continued during which defendant hit her head on the ground; after she remembers that someone helped her up and she was handcuffed and pushed to the police station. On the way to the police station the sargeant pulled defendant's necklace until it tore. Defendant kept shouting for someone to bring her kids but no one helped her. During the struggle on the pavement defendant called the sargeant "*bitch*"; when defendant was locked inside the cell at the police station the sargeant told her "*who's the bitch now*". In cross examination the defendant denied having kicked the sargeant, she insisted that the physical altercation started when the constable grabbed the scooter and the sargeant grabbed her arm. She also denied having threatened the sargeant and admitted only to calling her *bitch*.

Defendant's husband, Mykhaylo (Michael) Levin, also gave evidence<sup>7</sup>. In the first part of his testimony he relates what happened when they went on the bus and to a large extent he corroborates the version given by his wife. He went on to explain that after this initial argument the driver left the bus to return with two police officers; they were talking in Maltese. The police officers went up to them and asked them to leave the bus; they refused, explaining that they did not wish to have to wait an other hour for the next bus. The police officers asked if they were Maltese and Levin confirmed that they were not but offered to give them their details showing them their identity cards. The police officers however did not want to take their details and one of them left the bus to return with a female police sargeant. One of the constables put Levin's hands behind his back and took him off the bus; Levin tried to resist telling the police officer that there were the kids and the police officer told him that they will take care of the kids so Levin calmed down. While he was being taken out of the bus he could hear his wife shouting "*give me my kids*" so he turned round and saw the sargeant taking defendant down whilst holding on to her necklace at which stage the kids were alone on the bus, also screaming and shouting. Levin noted that the sargeant used a lot of force in dragging his wife out of the bus and whilst she was on the ground on the pavement. When defendant was taken to the police station, Levin, who was being held by the constable near the bus, asked to get his kids and it was only after five minutes that he was allowed back on the bus, with the police officer, to get the children. After that he was

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<sup>7</sup> Deposition at folio 201 et seq.

taken just outside of the police station where he and his children had to wait for hours before being allowed home without being given the opportunity to speak to his wife. Levin insisted that his wife did not use force against the sargeant and that she merely resisted the arrest in order not to be separated from the children.

In the course of the proceedings Dr Jonathan Joslyn was nominated to medically examine defendant in order to ascertain whether she had any visible injuries. From his findings<sup>8</sup> it appears that defendant suffered scratch marks and abbrasions with skin loss in her neck; abrasions on the front part of her arms; some abrasions on the back of the shoulder; a bruise on the back part of of the elbow; bruising around the wrist and front part of the hand; and bruising on the knee. All these injuries were classified as slight.

Having considered

That from the evidence tendered it is clear that there were two episodes in which the defendant was involved: the first which was between her and the bus driver, and the second which was between her and the police officers.

The charges brought forward against defendant by these present proceedings refer to the second incident, namely that involving the police officers<sup>9</sup>. The defendant is in fact being imputed with the offences provided for in sections 95, 96 and 338(ee) of the Criminal Code; she is also being charged with the breach of public peace<sup>10</sup>.

According to Professor Sir Anthony Mamo for the offence under section 96 to subsist three elements are required. The first element consists in an attack or resistance. The second element refers to the condition or capacity of the person against whom the attack or resistance is directed; the law speaks of a person lawfully charged with a public duty. In the third place it is necessary that the attack or resistance take place in the act of the execution by them of the law or of a lawful order from a competent authority.

Regarding this third element Professor Mamo continues by saying that:

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<sup>8</sup> Resulting from his testimony at folio 148 and his detailed report Doc JJ1 at folio 152.

<sup>9</sup> No action was taken regarding the first incident.

<sup>10</sup> The offence under section 338(dd) of the Criminal Code.

*The question arises whether resistance would be punishable if the officer was at the time abusing his powers or exceeding his jurisdiction, or otherwise acting unlawfully or arbitrarily. .... In our law the solution of this question is clear. So that the crime under section 96 may arise it is essential that the officer to whom resistance is offered should be acting **in the execution of the law** or of a **lawful order of the competent authority**. “Donde segue che se questa esecuzione lungi dall’essere voluta della legge, vi si trovi in opposizione, viene a mancare quel dato essenziale che si richiede per la criminosita della incontrata resistenza”. This is clearly the best and most equitable solution. The law gives its special protection to **the officer** not to **the man**<sup>11</sup>, and therefore just as resistance to the representative of public authority while discharging his lawful duty is, and should be, severely repressed, so conversely, the subject has, and should have, the right to resist any arbitrary or illegal act. It would be inequitable to require a passive obedience and submission in all circumstances from a subject who cannot be denied the right of expecting faithful observance of the law from the officers whose duty it is to cause it to be observed by others<sup>12</sup>.*

This doctrine had been followed consistently by our Courts. In a judgement given by the Court of Criminal Appeal on the 1<sup>st</sup> February 1958 it was said:

*Il-Pulizija, f’l-ezercizju tad-doveri taghha, ghandha d-dritt li tuza dak l-quantum ta’ forza li jkun necessarju; u kull membru tal-Pulizija ghandu dritt jiddefendi lill-annifsu jekk jigi aggredit waqt li jkun qiegħed jagħmel dmiru. Imma dan id-dritt tal-Pulizija lanqas ma ghandu jigi abbuzat; u għalhekk, stante li l-element intenzjonali fid-delitt ta’ attakk u rezistenza lill-Pulizija hu li l-imputat ikun agixxa biex jimpedixxi att ta’ gustizzja, l-imputat ma ghandux jigi ritenut hati ta’ attakk u rezistenza lill-Pulizija meta da parti tal-Pulizija kien hemm abbuz minn dan id-dritt tagħhom; ghax ma jistghax ikun hemm din l-intenzjoni meta hemm excess da parti ta’ pulizija jew ufficjal pubbliku<sup>13</sup>.*

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<sup>11</sup> All emphasis is of the author.

<sup>12</sup> Ref Notes on Criminal Law Vol II pagna 49/50.

<sup>13</sup> Ref Il-Pulizija vs Anthony Camilleri.



And in a more recent judgement given by the same Court of Criminal Appeal it was held, regarding section 96, that:

*Dana l-artikolu jirrikjedi mhux biss li l-vittma tkun “persuna inkarigata skond il-ligi minn servizz pubbliku” (l-istess bhalma jirrikjedi l-Artikolu 95(1)), izda wkoll li r-reat ikun sar fil-waqt li dik il-persuna hekk inkarigata minn dak is-servizz pubbliku “tkun qed tagixxi ghall-ezekuzzjoni tal-ligi jew ta’ xi ordni moghti skond il-ligi minn xi awtorita` kompetenti”. Din l-espressjoni hi differenti minn dik uzata fl-Artikolu 95(1) – “waqt li jkun jaghmel jew minhabba li jkun ghamel dan is-servizz, jew bil-hsieb li jbezzghu jew li jinfluwixxi fuqu kontra l-ligi fl-esekuzzjoni ta’ dan is-servizz”. .....* Mhux kull min qed iwettaq servizz pubbliku qed jezegwixxi l-ligi jew ordni moghti skond il-ligi<sup>14</sup>.

The Court of Criminal Appeal also made a distinction between assault or resistance in a situation where a police officer is arresting, or has just arrested, somebody and assault or resistance in a situation where a police officer is trying to convince somebody to do something. According to the Court of Appeal whilst in the first instance the police officer is executing the law and consequently the assault or resistance can constitute the offence contemplated under section 96, the same cannot be said of the second instance because in this second instance the police officer is not executing the law but discharging his public duty. In a judgement given on the 12<sup>th</sup> September 1996 the Court of Criminal Appeal in fact held that:

*biex jissussisti dana r-reat irid ikun hemm mhux biss attakk jew opposizzjoni ossia resistenza kontra persuna inkarigata skond il-ligi minn servizz pubbliku (f’dan il-kaz pulizija), izda wkoll li dana l-attakk jew resistenza isir bi vjolenza jew b’hebb u jsir fil-waqt li dik il-persuna **tkun tagixxi ghall-ezekuzzjoni tal-ligi jew ta’ ordni moghti skond il-ligi mill-awtorita’ kompetenti**<sup>15</sup>. Meta ufficjal tal-pulizja jintima li jkun ser jarresta lil xi hadd, jew ikun effettivament qed jipprocedi biex jarresta lil xi hadd, jew ikun ga arresta u qed izomm lil xi hadd arrestat, huwa jkun certament qieghed jezegwixxi l-ligi. Izda meta ufficjal tal-pulizija ikun qieghed jipprova jipperswadi lil xi hadd bil-kelma t-tajba sabiex iwarrab minn fuq il-*

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<sup>14</sup> Il-Pulizija vs Joseph Zahra decided 09.09.2002.

<sup>15</sup> Emphasis of the Court of Appeal.

*post u ghalhekk minghajr ma dak il-pulizija jezercita s-setgha tieghu li jarresta, ma jistax jinghad li dak il-pulizija jkun qed jagixxi "ghall-ezekuzzjoni tal-ligi" fis-sens tal-Artikolu 96, ghalkemm huwa jkun qieghed jaghmel is-servizz pubbliku tieghu fis-sens tal-Artikolu 95<sup>16</sup>.*

In view of the prevailing doctrine and jurisprudence on the topic at hand it should be clear that for an offence under section 96 it is essential that it is shown that the police officer, who was resisted or even assaulted, was executing the law.

Applying these principles to the case at hand the Court must now proceed to determine whether WPS 304 Lorna Mifsud<sup>17</sup> was executing the law when she ordered the defendant to get off the bus and go to the police station, and when she later proceeded to arrest the defendant in view of her (defendant's) refusal to leave the bus.

From the evidence brought forward it resulted that when WPS 304 went on the bus she first asked the defendant, who was sitting quietly in her seat, to get off the bus in order to go to the police station in order for the police to be able to get her version of the events that had taken place up to that time. Until that moment WPS 304 was discharging her duty<sup>18</sup> however she was not executing the law. Defendant refused to get off the bus in spite of being asked to do so a number of times. Following defendant's continued refusal a physical scuffle ensued in the course of which defendant called WPS 304 "*bitch*". At a certain point in the course of these events a decision to arrest defendant was taken and executed; defendant resisted the arrest and in the ensuing scuffle both defendant and WPS 304 sustained minor injuries.

There is a very apparent conflict in the evidence brought before this court in relation to all relevant facts<sup>19</sup> including as to when the decision to arrest defendant was taken. According to her version WPS 304 felt that she should arrest defendant when she (defendant) called her *bitch*, also telling her *I'll kill you*. According to the sergeant's testimony defendant *was not obeying the police orders, and she kept refusing to get off the bus. Once my colleague PC477 removed the scooter she became aggressive and then she started*

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<sup>16</sup> Ref Il-Pulzija vs Lawrence Attard.

<sup>17</sup> And PC446 and PC730 before her.

<sup>18</sup> As were PC446 and PC730

<sup>19</sup> There are conflicts even between the versions given by the witnesses of the prosecution.

*punching and kicking me all over and then she told me bitch i'll kill you in front of the bus which was full of people, then she high kicked me in my upper chest and she kept resisting and I immediately informed her that she was under arrest<sup>20</sup>. In cross examination WPS304 also stated that she went on the bus to evaluate the situation and I saw that the arrest was a must once she did not obey and she started kicking me all over<sup>21</sup>. PC730 related this part of the incident as follows: when PC446 removed the scooter in order to make way she became violent and kicked the sargeant in the chest so I escorted her husband outside and the sargeant escorted her to the police station<sup>22</sup>. He explained further saying: she started resisting the arrest, calling the sargeant bitch<sup>23</sup>. Referring to this part of the incident PC 446 explained that the sargeant came on the bus and I told her about the situation and she (defendant) still refused. The sargeant told her several times and then all of a sudden I told her come on let's solve this problem because it is just a small problem and I tried to remove the scooter in front of her and as soon as I had done that she became aggressive and she attcked the police sargeant<sup>24</sup>. Gordon Borda, the bus driver, had this to say about this part of the incident; the male police officers called for a female colleague... she tried to convince the accused to get down from the bus, however.... she refused to get down and she was resisting any attempts made by the police officers to take her from the bus. The police officer tried to pull the accused from the hand but at that time the accused took a sccoter which she had in her possession... and she started waving it. The police officer tried to take the sccoter ... but the accused started waving her hands at the police officer and she was resisting her<sup>25</sup>. Defendant on her part says that there was a lot of arguing going on.... but at one point the police officer grabbed the sccoter and I grabbed the bag and we started to pull it....when the police officer grabbed my arm it seemed to me that the other police officer grabbed my husband....<sup>26</sup>*

In spite of the conflicting versions there can be no doubt that the police officers involved in this incident had decided a priori that the defendant should get down from the bus and go to the police station; in fact they repeatedly asked her to do so whilst defendant was persistent in her refusal.

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<sup>20</sup> Third paragraph folio 41.

<sup>21</sup> Sixth paragraph folio 51.

<sup>22</sup> Ninth paragraph folio 64.

<sup>23</sup> Eleventh paragraph folio 64.

<sup>24</sup> Third paragraph folio 91.

<sup>25</sup> Folio 88.

<sup>26</sup> Third paragraph folio 180.

At that stage defendant was not in a state of arrest. From the evidence it also appears that the physical altercation was triggered when PC 446 removed the scooter. He did not say why he removed the scooter however there can be no doubt from the chain of events up to that time and from the versions given, in particular his own admission that he told her *that if she is not going to come with us and cooperate I am going to get the police sargeant and that she has to use force if necessary*<sup>27</sup>, that it was at that moment that the first step in the arrest of the defendant was taken. In fact the Court is convinced that the decision to arrest the defendant was taken before the physical altercation started and it was taken because of what the police officers involved in the incident perceived as defendant's unlawful refusal to obey their order for her to get off the bus and go to the police station.

At this stage the Court must also refer to the fact that defendant called WPS 304 "*bitch*". There is no doubt that defendant did call the sargeant *bitch*; she herself admits to this<sup>28</sup>, however she insists that she said this after the sargeant started dragging her and when she was on the pavement after having been dragged out of the bus. Defendant is in part corroborated in this by PC730 who claims that *defendant started resisting the arrest calling the sargeant bitch*<sup>29</sup>. In her testimony WPS 304 on the other hand claims that she decided to arrest defendant after the physical altercation had started and when in that altercation defendant "resisted" and called her *bitch*. In this assertion (taken in the context of her full version of the incident) WPS 304 is implicitly confirming that the physical altercation was triggered by her colleague's decision to remove the scooter<sup>30</sup> and that the word *bitch* was uttered after. Since the Court is satisfied that it was the commencement of the execution of the arrest that triggered the physical altercation, the Court is also satisfied that the decision to arrest the defendant had already been taken when the word *bitch* was uttered.

Having established this, it is now essential to determine whether that decision (to arrest defendant), at that point in time, was correct or whether it was arbitrary and exceeded "*their jurisdiction*".

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<sup>27</sup> Third paragraph folio 91.

<sup>28</sup> Ref last paragraph folio 182.

<sup>29</sup> This statement clearly indicated that defendant called the sargeant *bitch* when she was resisting the arrest i.e. when the sergant was already attempting to execute the arrest.

<sup>30</sup> All parties confirm that this was the first "physical" contact between any one of the police officers and the defendant.

The Criminal Code sets out clear rules as to when a person may be arrested. The general rule is that the police may arrest a person when there are lawful grounds and only after obtaining a warrant to that effect from a Magistrate<sup>31</sup>. The law does provide for exceptions, in fact section 355X of the Criminal Code provides that the police may proceed *to arrest without warrant anyone who is in the act of committing or has just committed a crime punishable with imprisonment, or whom he reasonably suspects to be about to commit or of having just committed such a crime.* The law also provides for the arrest, without a warrant, in cases **of crimes not subject to the punishment of imprisonment and of contraventions.** In this case however the arrest without a warrant is only permissible if:

- (a) the person be detected in the very act of committing the offence;*
- or*
- (b) the arrest be necessary to prevent the commission of an offence in respect of which the Police may institute criminal proceedings without the complaint of the injured party; and*
- (c) in either of the cases mentioned in paragraphs (a) or (b) one of the conditions mentioned in article 355Z is satisfied.*<sup>32</sup>

In terms of the definition given in the same provision of law: *A person shall be deemed to be detected in the very act of committing an offence, if he is caught, either in the act of committing the offence, or while being pursued by the injured party or by the public hue and cry.*

Section 355Z then provides that;

*The general arrest conditions are:-*

- (a) that the identity of the person is unknown or cannot be readily ascertained by the police officer; or*
- (b) there is a doubt whether the particulars furnished by the person are true; or*
- (c) that the person has not furnished a satisfactory address for service, or there are doubts about whether the address provided is satisfactory for service, or that at least some other person may according to law receive service on his behalf at the address given;*
- or*

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<sup>31</sup> Ref section 355V.

<sup>32</sup> Ref section 355Y.

- (d) *that the arrest is necessary to prevent the person -*
  - (i) *causing physical harm to himself or to any other person; or*
  - (ii) *suffering physical injury; or*
  - (iii) *causing loss or damage to property; or*
  - (iv) *committing an offence against public decency; or*
  - (v) *causing an unlawful obstruction on any public road; or*
- (e) *that the police officer has reasonable grounds for believing that the arrest is necessary to protect a child or any other vulnerable person.*

The decision of the police officers involved in this incident to arrest defendant was taken because she refused to get off the bus; they wanted her to get off the bus in order to take her to the police station, apparently to get her version of events with regard to the incident involving the bus driver. From the testimony of the bus driver the only offence that might have been committed prior to the intervention by the police was a contravention. However, and in terms of the above quoted provisions of law, an arrest in case of a contravention is only justified when the person is detected in the very act of committing the contravention, and this provided that the conditions listed in section 355Z are satisfied.

When the police officers went on the bus defendant was sitting quietly in her seat; she was not doing anything that may be considered an offence. Since the only offence that might have been committed before the police officers went on the bus was a contravention they would have been justified in arresting the defendant if the conditions listed in section 355Z were satisfied. However from the acts it does not appear that any one of the police officers present on the bus attempted to verify defendant's identity and her place of residence<sup>33</sup>. At that stage the arrest of the defendant would clearly have been in breach of the Law. It seems that the police officers involved were aware of this because they did not arrest defendant immediately on boarding the bus; what they did was to **order** her to get off the bus, an order which she refused to comply with.

In terms of section 338(ee) of the Criminal Code any person *who disobeys the lawful orders of any authority or of any person entrusted with a public service, or hinders or obstructs such person in the exercise of his duties ..... or in any other manner whatsoever* commits a contravention.

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<sup>33</sup> Defendant and her husband tried to furnish these details but they were ignored.

It is very clear that, like section 96, this provision of Law is intended to ensure that police officers (like all public officials) are put in a position where they can carry out their duties efficiently and effectively. There can be no doubt that legitimate orders of the police, in the lawful exercise of their duties, are to be complied with, to the letter, immediately on being made. Timely compliance is essential not only because police officers should not be hindered in their duty but also because very often such compliance is essential in order to ensure public order. In fact the Court of Criminal Appeal held that:

*Ordni legittimu*<sup>34</sup> mghoti mill-pulizija jew mill-awtorita ghandu dejjem jigi obdut u bla dewmien, salv id-dritt li wiehed jirreklama wara dwar il-gustizzja intrinsika ta' dak l-ordni.

*Ordni jitqies legittimu ghall-finijiet tal-kontravvenzzjoni kontemplata f'l-artikolu 338(ee) tal-Kodici Kriminali jekk ikun prima facie legittimu jigifieri jekk ikun prima facie regolari fil-kontenut tieghu u fil-forma li bih jinghata.*<sup>35</sup>

In the above quoted case access to a particular road was closed on account of some road works and a *no entry* sign had been placed. The defendant (in that case) attempted to drive into that road and on being stopped by a police officer insisted that she should carry on and in fact ignored the police officer and proceeded to drive into that road. The Court found that, on being ordered by the police not to drive into that road, defendant should have obeyed even though she felt that, as a local counsellor, she had the right to drive through that road. Clearly in that case the police officer had, not a right, but the duty to ensure that cars do not drive into a road where road works were being carried out. The circumstances of the case at hand however are very different.

It has already been established, in the case at hand, that when the police officers (WPS 304, PC 446 and PC730) went on the bus there was no sufficient reason at law to arrest the defendant. Had there been such sufficient reason they would have arrested her and taken her to the police station immediately. No one may be taken to a police station, against his

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<sup>34</sup> Emphasis of this Court.

<sup>35</sup> Ref II-Pulizija vs Maria Victoria Gialanze decided 25.06.1997.

will, in order to answer questions about any incident in which he or she may have been involved, unless legally under arrest. But the police officers involved wanted to get defendant off the bus at all costs, so they “asked” her to voluntarily do what they couldn’t legitimately make her do.

At that stage defendant was not in a state of arrest because the circumstances and events up to that time did not warrant her arrest. Consequently the police officers, whilst free to ask her to go to the police station, could not order her to do so against her will because that would be tantamount to arresting her, in circumstances where her arrest was not justified. It follows, in terms of the above quoted judgement, that the order given was not *prima facie* legitimate, either in content or in form, and that defendant was justified in refusing to obey it. It consequently also follows that the police officers *exceeded their jurisdiction* when they decided to arrest the defendant because she refused to voluntarily go to the police station in those particular circumstances and it also follows, in line with the doctrine and jurisprudence further above quoted, that her arrest was unlawful and that defendant was justified in resisting the police officers.

Taking all the above into consideration the defendant cannot be found guilty of the first and the third charges brought against her.

Section 95 of the Criminal Code (on which the second charge brought against defendant is based) refers to the reviling, threatening of, and causing bodily harm to, a person lawfully charged with a public duty. Three elements are required for this offence to subsist:

- the revilment, threat or bodily harm;
- made against a person lawfully charged with a public duty;
- in the execution or on account of the execution of his duties.

Insults, threats and indeed bodily harm constitute offences under other provisions of the Law, however under this provision, section 95, the punishment is aggravated when the offences are carried out against a person lawfully charged with a public duty. According to Professor Mamo the purpose of the law in creating this special offence is to afford a special guarantee so that those officials may proceed in the discharge of their duty freely, undisturbed and without suffering any indignity<sup>36</sup>.

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<sup>36</sup> Op Cit page 43. It is to be noted that in the part referred to the author was discussing section 93 of the Criminal Code, however, in discussing section 95 the author maintained that the material and moral



It has been established that in the scuffle that ensued following defendant's unlawful arrest WPS 304 suffered minor injuries and that defendant called her *bitch*<sup>37</sup>. However when these events took place (the infliction of the minor injuries and the uttering of the word *bitch*) WPS 304<sup>38</sup> had exceeded her authority and the defendant was merely resisting an unlawful arrest. It has also already been established that *it would be inequitable to require a passive obedience and submission in all circumstances from a subject who cannot be denied the right of expecting faithful observance of the law from the officers whose duty it is to cause it to be observed by others*<sup>39</sup>. In view of this and in view of the fact that the provisions of law under examination afford special protection to the officer, **lawfully** discharging his duty, and not to the person, the defendant was justified in her resistance and cannot be held responsible for the injuries sustained by WPS304.

Defendant also called WPS304 *bitch*; this word, in the context in which it was said, may be considered an insult. However for the offence under examination to subsist the law requires not only the material elements but also the formal one. Expounding on this formal element required the Court of Criminal Appeal<sup>40</sup> held that:

*hemm bzonn li l-kliem (jew gesti, kitba, disinji, ecc.) jkunu fil-fatt ingurjuzi, kif ukoll hemm bzonn l-element formali li jikkonsisti fl-intenzjoni li wiehed joffendi ufficjal pubbliku. Hemm kazijiet li fihom l-element morali (formali), cjoe` dana l-animus injuriandi, jigi presunt, u dana jsir meta l-kliem ikunu per se ingurjuzi u tali li wiehed ghandu ragonevolment jirritjeni, fl-assenza ta' prova in kuntrarju, li ntqalu bil-hsieb li l-persuna li ghaliha dawk il-kliem kienu diretti tkun ingurjata, cjoe` bil-hsieb li jintilef jew jitnaqqas il-gieh ta' dik il-persuna. Jekk, pero`, il-kliem ma jkunx per se u mad-daqqa t'ghajn ingurjuz, trid issir indagini biex wiehed*

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elements of the two offences (sections 93 and 95) are the same and that a discussion of section 95 *does not call for any special notice in addition to what was already said in connection with section 93* (ref page 46).

<sup>37</sup> The prosecution is also alleging that defendant also threatened WPS 304 with the words: *I'll kill you*. The only person who reported these words being said was WPS304. Given that the defendant denies having said these words and no one else reported these words as having been said it is the Court's view that not sufficient evidence was brought to substantiate the claim that such words were in fact said.

<sup>38</sup> As well as PC 446 and PC 730.

<sup>39</sup> Professor Mamo op cit supra.

<sup>40</sup> In the judgement given in the case *Il-Pulizija vs Amante Camilleri* decided on the 17.10.1997.

*jistabilixxi jekk il-prosekuzzjoni ppruvatx sal-grad li trid il-ligi f'materja penali li dawk il-kliem intqalu f'cirkostanzi u b'tali mod li kienu ingurjuzi għall-persuna li lilha kienu diretti u ntqalu mill-agent bl-intenzjoni li joffendu. Fi kliem iehor, anke jekk il-kliem ikun per se u mad-daqqa t'ghajn ingurjuz, jista' jaghti l-kaz li jkun ntqalu mhux bl-intenzjoni li joffendu izda, per eżempju, b'cajta (animus jociandi) jew filwaqt li l-agent ikun qieghed legittimament jipprotesta kontra xi agir partikolari (animus reclamandi). Għalhekk jekk il-Qorti tkun sodisfatta li l-hsieb tal-agent ma kienx li jingurja izda li jagħmel rimostranza, jigi nieqes dan ir-reat<sup>41</sup>. Tali protesta, izda, certament għandha l-limiti tagħha; il-kliem li jinghad u speċjalment il-mod kif jinghad għandu jkun limitat sabiex titwassal dik il-protesta, b'mod għalhekk li f'kaz ta' eccess ma jkunx jista' jibbenefika mid-difiza li dan il-kliem ikun intqal minnu animus reclamandi.*

In view of the foregoing and in view of the circumstances in which she uttered the word *bitch* it is clear that defendant was protesting against the way she was being handled by WPS 304 and that consequently her intention was not to offend. In these circumstances defendant cannot be found guilty of the second charge brought against her.

Neither can she be found guilty of the fourth charge brought against her i.e. breach of public peace. Whilst there can be no doubt that this incident grossly disturbed the public peace, the entire incident was unfortunately provoked by the police officers due to their mishandling it; the defendant cannot be held responsible for the consequent breach of the public peace.

Wherefore the Court finds defendant not guilty of the charges brought against her and discharges her therefrom.

**DR DOREEN CLARKE**  
**MAGISTRATE**

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<sup>41</sup> Emphasis of this Court.