



## **Court of Criminal Appeal**

Madame Justice Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal Nr. 329/2017

**The Police  
Inspector Godwin Scerri**

**Vs**

**Salih Usta**

Today, 31<sup>st</sup> July 2018.

The Court,

Having seen the charges brought against the appellant Salih Usta holder of Maltese Identity Card Nr. 22538A charged before the Court of Magistrates (Malta), as a Court of Criminal Judicature with having:

On the 20th May, 2016 between 21:00 hours and 23:00 hours , as the person responsible for the establishment styled as Murphy's Bar, situated in Tourist Street, St. Paul's Bay:

1. Operated a loud speaker, gramophone, amplifier or similar instrument made or caused or suffered to be made which was so loud to have caused a nuisance to his neighbour Christopher Maggi;
2. Also accused of becoming recidivist after he was sentenced on the 12th February 2016 before Magistrate Dr. Charmaine Galea LL.D in terms of sections 49 and 50 of Chapter 9 of the Laws of Malta.

The Court was kindly requested that in case of guilt his license of said establishment shall be cancelled or suspended for anytime in its discretion (Art. 320 Cap. 10, Art. 20 Cap. 441).

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 11<sup>th</sup> July, 2017, by which, the Court, after having seen

Sections 41(2)(a) of Chapter 10, declared the accused Salih Usta guilty of the first, charge laid against him and condemned him to the payment of a fine (ammenda) of fifty five euro (€55) whilst acquitted him of the second charge

Having seen the application of Salih Usta filed on the 19<sup>th</sup> July, 2017, wherein they humbly pray this Court varies the judgement of the Court of Magistrates (Malta) as

a Court of Criminal Judicature given on the 11<sup>th</sup> July 2017 in the sense that while confirming that part of the judgement whereby he was acquitted of the second charge, revokes that part of the judgement whereby he was found guilty of the first charge and was condemned to the payment of a fine (ammenda) of fifty five euros (€55).

That the grounds of appeal consist of the following:

Appellant operates a shop by the name Murphy's Bar in St. Paul's Bay. The whole area is renowned for its touristic amenities and attendances. It consists of a bar with all due permits and licenses necessary for its operation inclusive of the extension in time and allowance for music to be played within a certain time. Complainant filed a formal report with the Qawra Police Station that appellant caused a nuisance to him between a particular period of time.

In view of a repetition of similar complaints, the Honorable Court appointed AIC Robert Musumeci to examine the situation as related by complainant, whilst taking into consideration the submissions of appellant. An examination in situ was carried out by the said technical architect who released a formal report. This report duly confirmed on oath, which report militates in favour of appellant, was drawn up after the said court expert took all the readings necessary to arrive at his conclusions. However, the First Court opted to disregard technical conclusions basing itself on assertions which were totally annihilated by the readings/measurements taken. It based itself on the purely subjective considerations instead of relying on scientific and technical data which result in favour of appellant's rights. The First Court opted for a subjective interpretation which with all due respect should have decided on an objective point of view. The Honorable Court did not refer to any scientific or technical data which would water down or totally do away with the conclusions of the technical expert. If such is the case, it should not have appointed him in the first place. In a matter of technicalities, it should not have substituted itself in reaching conclusions which per necessitatem had to be based on objective criteria.

It is humbly submitted that the regular complainant was the only person who filed reports against appellant. Complainant lives down the road from the bar and occupies a converted commercial premises. The area in question is one hundred per cent touristic area. When complainant took the decision to reside in that particular area, he knew beforehand the atmosphere and environment which exists in that area.

The affidavit released by WPC 264 only reports the complaint filed by complainant which complaint was denied by appellant. The said affidavit is self-explanatory and music was being played during the legally permitted hours. In this sense therefore, it does not constitute as evidence against appellant. The alleged timing was within the rights of appellant to play music. The evidence of

complainant was rebutted by appellant himself. In view of such lack of evidence in favor of the prosecution's case, more weight should have been accorded to the technical report which conclusions are self-explanatory. More so when appellant had taken all reasonable precautions to render his establishment safe from causing any inconvenience to neighbors, by rendering it soundproof. In fact, these conclusions were reached also by the technical expert. In fact, these conclusions nullify the inconvenience allegedly caused to complainant. It seems that scientific proven conclusions do not apply in the case of the present complainant.

The accusation refers only to an alleged inconvenience albeit music being played in a loud pitch which may have caused a nuisance to complainant. Any reference to any other aggravation or whatever does not form part of this accusation. The reference made to permit/license is a gratuitous assertion which should not have found itself in the ratio decidendi of the court.

Having seen the records of the case.

Having seen the updated conviction sheets of the defendants.

Now therefore duly considers:

The fact of this case are the following:

By examining the affidavit of **PC 1026 Brendon Gauci** it transpires that the complainant Christopher Maggi went to the Qawra Police station at about 22.30 wherein he reported that there was loud music coming from Murphy's Pub and that due to the loud noise he could not sleep. Maggi told him that when he was in hi apartment at about 8.15p.m h heard loud music coming from the Murphy's Pub though since he was going out he did not feel that he should speak with the appellant. However when he returned back home at about 10.00pm the music

was still going on and thus he went to speak with the appellant who in turn told him he would lower the volume so he decided to go back to the bar though the person who was in the bar did not listen to him and that is why he went to the police station to file another report since this was becoming a daily occurrence.

Thus, the witness together with PC 1017 at about 10.00pm went to the indicated place and they noticed that there was live music on going. He spoke with the appellant who in turn told him that he had no such permit for live music.

The Court took note of the affidavit of **Carla Zahra** and the document exhibited by her, which indicate that the establishment Murphy's Bar is not covered with a license to operate amplified music though covered with a permit to remain open until 4.00a.m and have background soft music.

The Court took note of what was stated in the court verbal of 27th April in that the evidence given by the complainant in the case number 385/2017 in the above-mentioned names regarding the incident dated 13<sup>th</sup> February 2017 would also apply to this case. In that case, **Christopher Maggi**, had confirmed that he had gone to the police station on the 14<sup>th</sup> February 2016 and reported that on the 13<sup>th</sup> February 2016 at about 22.00p.m he was being disturbed from the music that was being generated in the bar named Murphy's Pub. Complainant also stated that this situation had been going on for a whole year and the situation had not changed and that he could no longer stand it. Therefore, the complainant did not give evidence with regards to the case under examination with reference to the specific date of the charge, but only testified in a general manner in that he was annoyed with the bass noise.

The Court took note of the report exhibited by Dr Robert Musumeci in the case number 385/2017 in the above names and it transpired that when the complainant has the windows of his bedroom closed and the music in Murphy's Pub is on full blast the readings are 52dBA whereas when the sound is switched off, the sound level in the complainants bedroom is 40 dBA. There seems to be

no reading regarding the decibels that can be recorded when the volume is not full but let us say half. The court expert also stated that if the music is full on then the patrons of the bar would not be able to speak thus insinuating that it is unlikely that the music is kept on full volume.

In this case, the accused Salih Usta gave evidence voluntarily and confirmed that he runs the Murphy's Irish Pub in Bugibba though he confirmed that he is also the owner. He states the appellant had told him that the problem was not the music in the bar but the bar itself. He told him that he did not want the pub around his house. He says that in his bar, he caters for old people and that young people do not hang out there. He said that thus his music is never loud otherwise; he would be sending people away when he is aware of the heavy coemption in the area. He said that the bar is in a touristic area and that not many Maltese people live there except in the summer months.

He also confirmed that he had installed soundproofing and that if one were to pass in front of the pub he would not hear the music. He said that he had been there for thirteen years and it was only Mr. Maggi who complained about the music. He said that he has no live bands but at times gets a person to play on a guitar and the music is then amplified though he never said that on the date mentioned in the charge there was such music going on.

### **Considers further**

The principle regarding the "*burden of proof*" is one that he who alleges something has to prove it. In fact, reference can be made to what Manzini states in his book entitled *Diritto Penale*,

*"il cosi della onere detto prova cioe' il carico di fornirla spetta a chi accusa," (onus probandi incumbit qui asserit).*

Thus, the result is one that in criminal cases the onus of proof rests on the prosecution during the whole case and it is only by exception that the accused is to dispute anything for example the defense of insanity. However, in this case the

appellant did not rest solely on the evidence brought forward by the prosecution but also offered to give his testimony voluntarily to dispute what was being alleged in his regard.

The obligation to prove guilt of an accused person is absolute and this on a level beyond reasonable doubt and should there be any doubt this would mean that the prosecution did not prove its case beyond reasonable doubt. Therefore, the Court would have to acquit the accused.

In the first instance the accused is charged with the contravention of having On the 20<sup>th</sup> May 2016, between 21:00 hours and 23.00 hours, operated a loud speaker gramophone amplifier or similar instrument made or caused to suffer to be made which was so loud to have caused nuisance to his neighbor Christopher Maggi.

The appellant in his application of appeal makes reference to the report carried out by Dr Robert Musumeci and said that this report was in his favor though the first Court still found the appellant guilty of such contravention. This Court however cannot understand what the appellant meant when he said that the technical report was in his favor. The expert only carried out a scientific test and the result was such that when the music in the bar is full volume the decibel readings are to the effect of 52DbA once the bedroom windows of the complainant are closed.

With reference to the charge under examination, the Court took note that the report filed by the complainant was one where he felt aggrieved by the noise generated in Murphy's bar however he makes no mention to the day and time of his complaint. Even the police report is very general. The parties to the case stated in the appropriate verbal that the evidence of Christopher Maggi in case number 385/2017 should apply *mutatis mutandis* to this case. Though on examination of this evidence it does not transpire that the complainant was reporting the incident mentioned in the charge. The Court cannot be faced with a particular charge reflecting a particular time and day and hear evidence of

what is the general situation without any reference at all from the complainant to this incident.

All that resulted from the proceedings is that the appellant was licensed as an operator to keep this bar open until four o'clock in the morning with effect from 27<sup>th</sup> August 2014 as stated by Carla Zahra on behalf of Malta Tourism Authority. The law also confirms that the music would thus have to stop at eleven in the evening and if the bar is found in the road mentioned in Schedule 5 then the operator could play music until midnight. Though not amplified music. Triq it - Turisti is found in Schedule 5 and therefore the appellant can play music though not amplified until midnight.

However, the Court underlines that this does not mean that the appellant can play music without giving due consideration to the neighbors in the area and thus he is to ensure that he adheres to the laws relating to the playing of music in commercial premises with respect to the laws relating to the 'bon vicinat' despite having a valid license covering his premise.

In fact in the judgment given in the names **il-Pulizija vs Raymond Spiteri**<sup>1</sup> the Court held the following:-

*"Illi pero l-ġestjoni ta' din l-attività permezz ta' licenza ma tfissirx li huwa jista' jopera mingħajr konsiderazzjoni xierqa għar-regoli tal-bwon vicinat jew mingħajr ma possiblment jinkorri fi ksur ta' liġi penali ordinarja fil-każ t'infrazzjoni ta' tali liġi sempliċiment għax huwa fil-pussess ta' licenza".*

In addition, any license does not prejudice the rights of third parties to be protected from the law.<sup>2</sup>

The appellant is bound to adhere to the conditions of his license as clearly stated in the judgement in the names **Il-Pulizija vs. Anthony Cuschieri et**<sup>3</sup>

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<sup>1</sup> obiter *Il-Pulizija vs. Raymond Spiteri*, Qorti tal-Appell Kriminali, VDG, deċiża nhar l-20 ta' Novembru 1998.

<sup>2</sup>Vide *Bugeja vs. Washington* decided from the Court of Appeal civil jurisdiction on the 5<sup>th</sup> May 1897 as quoted by the late Judge William Harding in the case *Il-Pulizija vs. Anthony Cuschieri et*, decided by the Criminal Court of Appeal decided on the 16<sup>th</sup> December 1946.

*"...għandu jqis bħala insita fil-liċenza, bla ebda bżonn li tiġi espressament enuncjata, illi l-użu awtorizzat għandu jkun skont, eżerċitat b'rispett u fil-limiti tal-liġi."*

The golden question is whether the appellant was transgressing the law whilst playing music on the day, time and place indicated in the charge and this is what the Court is basically asked to decide upon.

According to regulation 13 of Legal Notice 1 of -2006: -

*13. (1) A license shall be issued in the name of an individual personally or on behalf of a commercial partnership or company and the address shall be the address of the commercial premises.*

*(2) The licence shall be issued by reference to the applicable categories and types of the commercial activities according to the Development permit issued by the relevant authority.*

*(3) Without prejudice to any other provision of law applicable in relation to a commercial activity, a licence issued under these regulations shall be subject to the applicable conditions contained in the Second Schedule to these regulations.*

The Second Schedule entitled Conditions for Carrying Out a Commercial Activity provides that-

*The following conditions shall apply to all commercial premises whether unlicensed or licensed by any authority and regulated by any legislation.*

*02. The commercial activity carried out in the premises or things stored within the premises shall not:-*

*02.1 cause annoyance to neighbours;*

*02.2 be likely to occasion any fire or explosion;*

*02.3 emit exhalation, fumes, vapours, gases, dust or emit noxious or offensive odours into the atmosphere that may cause damage or are injurious to health;*

*02.4 cause annoyance by way of noise*

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<sup>3</sup> Decided on the 16<sup>th</sup> December 1946 by the Criminal Court of Appeal

04. Any commercial activity which carried out from any premises or outside a premises is regulated under these regulations.

The same Schedule provides further that:-

09. "No Commercial Activity located in an urban area can generate noise that can be heard from outside the premises that causes annoyance and disturbance to neighbours by playing of music by live bands or amplified music or other means between the hours of 11.00 p.m. and 9.00 a.m. of the following day".

It is the opinion of the Court that an inconvenience can be considered as an impediment depending on the case. It is true that not all inconveniences can be censored and punished before a criminal court. For this inconvenience to be punished before a criminal court it has to be proven that it is a serious inconvenience in an objective manner, it has to be a substantial inconvenience and not just reasonable<sup>4</sup>. Also the test that a Judge has to carry out should be an objective test although in cases where the noise is caused by noise the Court has to evaluate the evidence brought forward according to the witnesses brought forward who are complaining about such disturbance.<sup>5</sup> It is left in the good hands of the judge who has to evaluate the evidence each case *in concreto* if such an inconvenience as envisaged by the legislator subsists and it is not usual that a technical expert should be appointed<sup>6</sup>.

With regards to the legal definition that should be attributed to the word 'inconvenience' the Court makes reference to a judgment delivered by this same Court when presided by Judge William Harding in the names **Il-Pulizija vs. Anthony Cuschieri et al.**,) since this is important for the determination of the case.

That Court held that an inconvenience that is caused by the playing of loud music can be considered as a molestation in the sense of civil matters. However, *criminalibus*, the established limit should not be that applied in civil cases in other

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<sup>4</sup> *Il-Pulizija vs. Michael Grech*, Qorti tal-Appell Kriminali, PV, deċiża nhar is-30 ta' April 1998

<sup>5</sup> *Il-Pulizija vs. Raymond Spiteri*, Qorti tal-Appell Kriminali, VDG, deċiża nhar l-20 ta' Novembru 1998.

<sup>6</sup> *Il-Pulizija vs. Fortun Fava*, Qorti Tal-Appell Kriminali, VDG, deċiża nhar il-5 ta' Frar 1998.

<sup>7</sup> Decided on the 16<sup>th</sup> December 1946

words that the inconvenience is such as has to be above the level that is accepted by the *bon vicinat* which in normal cases should be respected. In the criminal field, there is need that the facts constitute a substantial inconvenience and material discomfort<sup>8</sup>.

In this regard therefore the inconvenience should be one that is 'grave' and 'not easily tolerated' as commented upon in the judgment in the names *Meli vs Calleja* decided on the 5<sup>th</sup> February 1908 also mentioned in this same case.

Besides the same inconvenience has to be one that is considered to be continuous and intense. If these elements do not concur then such an act would not fall under the remit of a penal sanction and this because otherwise would also be applicable to slight inconvenience which could possibly render social life difficult.

Judge Harding makes reference to the English Judge whilst making reference to the judgement delivered in the names *Bamford vs. Turnley*<sup>9</sup> where it was held that:-

*"The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the more general convenience or necessities of the whole community"*.

In fact as reported further up in the Maltese text in Legal Notice 1 of 2006 the second schedule speaks of '*sikkatura*'. In the English translation, the word used is 'annoyance'. In the Maltese language, '*sikkatura*' should have been translated as to mean 'importunity...boring...tiresome.to importune, to pester to annoy people, to bore.<sup>10</sup>

On the other hand, the term 'nuisance' is translated into the Maltese Language as

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<sup>8</sup> Here Judge Harding in his judgment makes reference to the English case in the names "*Walter vs Selfe*" 1851 which is reported by Burrows in his book "Words and Phrases Judicially Defined" in Volume III page 524.

<sup>9</sup> Decided in 1862

<sup>10</sup> "Maltese-English Dictionary" by Joseph Aquilina, Volume Two M-Z and Addenda, Midsea Books Limited, 1999 f'page 1314.

*"n.(i) sikkatura, ksir il-għajn, ksir ir-ras... private nuisance xi inkonvenjenza għal numru żgħir ta' nies; public nuisance, inkonvenjenza għal numru kbir ta' nies...2. aġġ. Li jagħti fastidju/dejjaq/jissikka n-nies; nuisance value, (haġa) li tiswa ta' disturb..."*<sup>11</sup>

Alternatively the term "annoyance" means "n. (1) fastidju, dwejjaq, sikkatura, irritazzjoni" u dan wara li jiġi premess li l-verb "annoy" ifisser : "dejjaq, issikka, xabba', importuna, irrita".<sup>12</sup>

Therefore in the Maltese context the words 'annoyance' and nuisance' have a meaning which is nearly synonymous. A cursory look at "*The Shorter Oxford English Dictionary*", of Little, Fowler u Coulson, edited by Onions, the meaning of the word "annoyance" is "1. The action of annoying; molestation. 2. The state of feeling caused by what annoys; vexation 1502. 3. Anything annoying, a nuisance 1502".<sup>13</sup>

On the other hand the term "nuisance" according to the dictionary is:

*"1. Injury, hurt, harm, annoyance. (In later use 2 or 2b.) 2. Anything injurious or obnoxious to the community or to the individual"*

In the opinion of the Court, these terms in this particular contest have a synonymous meaning and thus the legal principle that regulates them should be the same. In this case and in the light of what the complainant stated that noise was being generated by the music leads the court to understand that the complainant truly suffered an inconvenience as stipulated in the second schedule as causing a disturbance to neighbours.

In view of the above, this case is different to the other cases decided today between the same parties. In this case, the prosecution brought forward an independent witness PC 1026 who confirmed that he made an inspection on the premises after having received the report made by the complainant and at about

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<sup>11</sup> "English- Maltese Dictionary" by Joseph Aquilina, Volume Three M-R, Midsea Books Limited, 1999 f'page 2023

<sup>12</sup> "English- Maltese Dictionary" by Joseph Aquilina, Volume One, Midsea Books Limited, 1999 f'page 79

<sup>13</sup> Volume 1, A - Markworthy, Clarendon Press, Oxford, page 74.

10.30p.m found that there was live music being generated from the Murphy's Pub, which was annoying the complainant.

The Court feels that in this case the prosecution managed to prove its case on a level beyond reasonable doubt. The Court is not taking note of the fifth charge regarding recidivism since there was no appeal filed in this regard.

The Court rejects the appeal and confirms the judgment given by the first court in toto.

Consuelo Scerri Herrera

Judge