Court of Criminal Appeal

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

Appeal Nr. 326/2017

The Police
Inspector Godwin Scerri

Vs

Salih Usta

Today, 31st 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 24 February 2016 between 20:20 hours and 21:30 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 neighbor 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 11th 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 19th 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 11th 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) and to the payment of the sum of four hundred (€464.98) as expenses incurred in the appointment of "the court expert in the sense that he is declared not responsible and consequently not found guilty of the said charge and be acquitted similarly of the said charge and to the non-payment of the expenses related to the appointment of the Court expert.

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 Honourable 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 Honourable 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 favour 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 neighbours, 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 312 J Sultana** it transpires that the complainant Christopher Maggi went to report the incident to the Qawra police station on the 24th March 2016 wherein he reported at about 9.28p.m that the appellant was generating a lot of noise in his bar named Murphy's Pub in Triq it-

Turisti. He confirmed that whilst he was at the police station there was a high level of sound noise in his apartment which was emanating from Murphy's Bar. He described the noises as bass noises says that there was a lot of bass sound. The witness spoke to the appellant who in turn told him that he had an instrument to measure the noise bass and the result was good. This witness in fact had drawn up the police incident report which is exhibited in the acts of these proceedings a fol. 10 and confirms what the witness said under oath. The witness here however stated that the nuisance that was being generated allegedly took place at 8.20p.m and 9.20p.m

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

The Court took note of what was stated in the court verbal of the 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 13th 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 14th February 2016 and reported that on the 13th 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 which can be recorded when the volume is not full but lets 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 stats 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 competition 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 sound-proofing 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 defence 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. And therefore the Court would have to acquit the accused.

In the first instance, the accused is charged with the contravention of having between 22.10 p.m. and 23.35 p.m. on 23rd March 2016 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 neighbour 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 favour 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 favour. 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 in that regard 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 form 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 till four o clock in the morning with effect from 27th august 2014 as stated by Pl Quentin Tanti on behalf of Malta Tourism Authority. This witness also confirmed 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 he could play music till midnight. Though not amplified music. The witness also confirmed that Triq it -Turisti is found in Schedule 5 and therefore the appellant can play music though not amplified till midnight.

However, the Court underlines that this does not mean that the appellant can play music without giving due consideration to the neighbours 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**[1] the Court held the following:-

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

In addition any license does not prejudice the rights of third parties to be protected from the law.[2]

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**[3]

"*….għandu jqis bħala insita fil-liċenza, bla ebda bżonn li tiġi espressament enunċjata, 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 licence 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.

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

[2] Vide **Bugeja vs. Washington** decided from the Court of Appeal civil jurisdiction on the -5th 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 16th December 1946.

[3] Decided on the 16th December 1946 by the Criminal Court of Appeal

(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

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 is 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[4] . 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.[5] 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[6].

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**[7], 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 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

[4] ***Il-Pulizija vs. Michael Grech,*** Qorti tal-Appell Kriminali, PV, dečiża nhar is-30 t'April 1998
[5] ***Il-Pulizija vs. Raymond Spiteri***, Qorti tal-Appell Kriminali, VDG, dečiża nhar l-20 ta' Novembru 1998.
[6] Il-Pulizija vs. Fortun Fava", Qorti tal-Appell Kriminali, VDG, dečiża nhar il-5 ta' Frar 1998.
[7] Decided on the 16th December 1946

there is need that the facts constitute a substantial inconvenience and material discomfort[8].

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* 5th 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 the 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**[9] 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.[10]'

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

[8] 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.
[9] Decided in 1862
[10] "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/jdejjaq/jissikka n-nies; nuisance value, (ħaġa) li tiswa ta' disturb...*"[11]

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*".[12]

Therefore in the Maltese context the wors 'annoyance' and buisance' 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".[13]

"*Mill-banda l-oħra t-tifsira tal-kelma "nuisance" skont l-istess dizjunarju hija "1. Injury, hurt, harm, annoyance. (In later use 2 or 2b.) 2. Anything injurious or obnoxious to the community*"

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.

Therefore, in view of the above the Court does not feel it is necessary to explain further on this matter since the complaint filed by the complainant relates to the

[11] "English- Maltese Dictionary" by Joseph Aquilina, Volume Three M-R, Midsea Books Limited, 1999 f'page 2023
[12] "English- Maltese Dictonary" by Joseph Aquilina, Volume One, Midsea Books Limited, 1999 f'paġe 79
[13] Volume 1, A – Markworthy, Clarendon Press, Oxford, paġne74.

playing of music in a general fashion in a commercial place, which is duly licensed.

The prosecution had to bring further evidence to the Court to prove that on the day in question the music that was played in the time frame that the law provides was of disturbance to the neighbourhood or to a number of neighbours for the test to be object. Otherwise, this court would be deciding the matter on a subjective test carried out by the complainant who might have an ulterior motive for filing such a complaint. Since the police were faced with an allegation that whilst the complainant was at the police station there was loud music then they could have made an inspection and related back to the court about their findings. Something they failed to do. It should be in the interest of the police to check such reports and follow them up to reduce them and intervene to bring people in line with the law.

The Court feels that in this case the prosecution did not manage to prove its case on a level beyond reasonable doubt. The Police should in such circumstance where they see that a person is insisting on reporting some one that his report is genuine and they can only do this if they inspect the premises unexpectedly and to inspect the premises when an actual report is made at the police station. The fact that the appellant did not insist with the police to carry out an inspection relating to his report on the same day is also indicative that he was not truly annoyed perhaps slightly disturbed, in which case such disturbance would have to be tolerated on the basis of *bon vicinat*. The complainant himself was rather skimpy in the evidence he gave so much so that he did not even bother to describe the type of noise that was being generated on the day in question. Therefore, the Court cannot find the appellant guilty of this charge.

With regards to the second charge being that of recidivism. The Court notes that this Court has acquitted appellant of the first charge and therefore cannot find him guilty of the charge of recidivism.

The Court therefore upholds the appeal, varies the judgement of the first court in the sense that it is confirming the part where the appellant was acquitted from the second charge, revokes the finding of guilt of the first charge and the punishment meted therein and therefore declares appellant not guilty of all charges.

(ft) Consuelo Scerri Herrera
Judge
TRUE COPY

Franklin Calleja
Deputy Registrar