



Court of Criminal Appeal

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

Appeal Nr: 392 / 2018

The Police
(Inspector Elton Taliana)

vs

Natalia Menshova

Today the, 15th January 2019

The Court,

Having seen the charges brought against Natalia Menshova holder of Maltese identity card no. 18943 A, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

On the 26th October 2012, at 10:00 hrs, in Triq Santa Klara, Bahar ic-Caghaq:

- 1) Wilfully committed any spoil, damage or injury to or upon any movable or immovable property belonging to Raphael Ascjak, which amount of damage does not exceed one thousand and one hundred and sixty-four Euros and sixty-nine cents (€1,164.69);
- 2) Without the intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another

person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person;

- 3) Even though without the intent of committing another offence, enters into the dwelling-house of another person, against the express warning of such person, or without his knowledge, or under false pretences or by other deceit.

Moreover for having on the same date, time and in the previous months, in the same place and in other places in Malta:

- 4) Pursued a course of conduct which amounts to harassment of Raphael Ascias and his family;
- 5) Pursued a course of conduct which caused Raphael Ascias and his family to fear that violence will be used against him or his property or against the person or property of any of his ascendants or descendants.

The Court was requested to issue a protection order against the accused under Article 412(C) of Chapter 9 of the Laws of Malta to provide for the safety of Raphael Ascias and his family or for the keeping of public peace or for the purpose of protecting the injured persons from harassment or other conduct which causes fear of violence.

Having seen the judgement meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 4th October, 2018 whereby the Court upon seeing Articles 325, 85, 339 (1) (o), 251 A, 251 B, 383, 384, 385, 386, 387, 412 C, 17, 18, 31 and 533 of Chapter 9 of the Laws of Malta found accused Nathalia Menshova not guilty of the first (1st), third (3rd), fourth (4th) and fifth (5th) charges and acquits her of the same whereas found her guilty of the second (2nd) charge and condemned her to a fine (multa) of one hundred Euros (€100).

The accused is hereby in terms of Article 533 of Chapter 9 of the Laws of Malta was ordered to pay expenses incurred in relation to court nominated experts Dr. Martin Bajada and Dr. Juliana Scerri Ferrante amounting to one thousand one hundred and eighty-six Euros and ninety-six cents (€1186.96).

Having seen the appeal application presented by the appellant Attorney General in the registry of this Court on the 22nd October, 2018 whereby confirming that part of the judgement where the Court of First Instance found the appellant not guilty of the charges brought against her and revoking that part of the judgement where the appellant was found guilty of the second (2nd) charge and condemned to pay a fine (multa) of one hundred Euros (€100) together with the expenses incurred for the court-nominated experts amounting to one thousand one hundred and eighty-six Euros and ninety-six cents (€1186.96) by finding the appellant not guilty and, subordinately, giving a punishment that is more equitable based on the circumstances and the facts of the case.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

1. Having seen the grounds are clear and manifest and consist in the reason that the Honourable First Court should not have found the appellant guilty of the second (2nd) charge and ordered the appellant to pay the expenses of the court-related experts.
2. That the facts of this case go back to October 2012 whilst the sentence of the First Honourable Court was handed down in October 2018, a whole six (6) years after the alleged incident occurred.

3. That the facts of the case are simple. This case deals primarily with the alleged arbitrary exercise of pretended rights by the accused on the 26th October 2012 over a property, namely No. 8, Triq Santa Klara, Bahar ic-Caghaq, limits of Naxxar. It is evident from the acts of the proceedings that the accused and the *parte civile* were in a long-term relationship and that for several years they lived together in the above-mentioned property.

The Court had heard that on the day the *parte civile* (Raphael Asciak) had made a report claiming that the front main gate of his residence was locked with a chain and three padlocks and so he could not enter his residence. With the help of the Civil Protection Department the padlocks were cut and they entered the gate. The front door was not locked and the officers had entered the farmhouse without using any force. Inside the kitchen they found the accused who claimed that the farmhouse is her residence. The Inspector claimed that the accused produced a rent agreement whilst the *parte civile* had later on the same date produced a contract claiming to show that he is the sole owner of said property.

4. That the Honourable First Court did not consider the fact that the *parte civile* had no right to tell the appellant not to enter the property as he had previously done on a number of occasions.
5. That the Honourable First Court rightly states that “...*the right of enjoyment of the accused over the property in question does not give her the right to deny the right of enjoyment of the parte civile over the same property.*¹”

Following the production of the rent agreement (exhibited as Doc. ET6) wherein Camelot Properties Limited (represented by Raphael Asciak) as the owner of No. 8, Triq Santa Klara, Maghtab limits of Naxxar leased said property

¹ Page 25 of the judgement

to tenants Raphael Asciak and Natalia Menshova for a period of 30 years, *a contrariu sensu*, it can also be argued that “the right of enjoyment of the *parte civile* over the property in question does not give him the right to deny the right of enjoyment of the appellant over the same property”.

6. That in ordering the appellant to pay the expenses of the court-nominated experts Dr Martin Bajada and Dr Juliana Scerri Ferrante, the Honourable First Court failed to consider that both above-mentioned experts found in favour of the appellant.
7. That from the report presented by court-nominated expert Dr Martin Bajada, the Honourable First Court stated that “the stills produced contradicted certain details, especially the chronology of events, provided by the witnesses of the prosecution”².

Also, with regards to court-nominated expert Dr Juliana Scerri Ferrante, the Honourable First Court stated that said expert “*testified that there are too many possibilities and too many variables of which he could be the author and she could not be the author. As a result court expert concluded that in this particular case the extremes of variation were immense and thus a conclusion is impossible.*”³

8. Therefore, in view of the conclusions reached by both court-nominated experts, the Honourable First Court should have ordered the *parte civile* to pay for these expenses and not the appellant.

The Court heard the parties make their oral submissions on the 6th December 2018 and ask the Court to proceed to final judgment.

Considered further.

² Page 11 of the judgement

³ Page 12 of the judgement

That despite the appellant being accused of five charges she was only found guilty of The second charge being that relating to the offence of pretended rights. Thus the Court will examine the proceedings on y in regard to this charge to see whether it should disturb the judgment reached by the first court. It is an established fact that this court is not very happy to intrude upon the discretion exercised by the courts when speaking of appreciation of facts carried out by the Courts of Magistrates but only intervenes if such discretion was used incorrectly and thus the conclusion reached by that Court was unsafe and satisfactory.

In the offence of pretended the rights the Court makes reference to a well known case in the names **Il-Pulizija vs. Giuseppe Bonavia et⁴**, where an analytical definition was given to the crime under review and four primary elements were pin pointed as have to be proved the prosecution for the offence of pretended rights to exist, namely.

- (a) *“att estern li jimpedixxi persuna oħra minn dritt li hija tgawdi, u li jkun sar biddissens esplicitu jew implicitu ta' dik il-persuna;*
- (b) *l-imputat irid jemmen li qed jaġixxi bi dritt;*
- (c) *ix-xjenza tal-imputat li qed jieħu b'idejh dak li suppost jieħu tramite l-proċess legali;*
- (d) *li l-att ma jinkwadrix ruħu f'reat aktar gravi.”*

As was high lighted in the case in the names **il -Pulizija vs Eileen Said⁵**, for the crime of pretended rights to exist it is imperative that *“Hemm bżonn li jkun hemm att pozittiv li jippriva lit-terz, Jew ifixklu filpussess tal-ħaġa”*.

What is likewise important as was stated in the case in the names **Il-Pulizija vs Joseph Bongailas⁶** that *“ sa dak in-nhar li sar l-allegat att ta' spoll kellhomx il-kwerelanti l-pussess, jew l-użu u tgawdija tal-fond in kwistjoni.”*

⁴ Criminal Appeal on the 1st of October 1944, Vol.XXXII - IV, p.768

⁵ Criminal Appeal. Inf., on the 19th June 2002

⁶ Criminal Appeal . Inf.,on the 22nd Cotober .2001

From an examination of the judgment delivered by the Courts of Magistrates it transpires that the accused had been in a long term relationship with Raphael Axiak and they used to live together in the house numbered 8, Triq Santa Klara, Bahar ic-Caghaq, limits of Naxxar. However, a report was launched by Raphael Axiak stating that the accused had arbitrarily deprived him of further access to his house from the 26th October, 2012.

With reference to this charge the Court heard **Inspector Elton Taliana** state that on the 26th October 2012 he was informed by PS 950 Alan Buhagiar that a report was made by Raphael Axiak stating that he found the main gate of his residence was locked with a chain and three padlocks and thus could not obtain access. It was only with the help of the intervention of the Civil protection that the padlocks were cut that he managed to make his way through to the house. He however stated that the front door of the house was not locked and thus the police officers obtained access without further difficulty. In the house, the inspector said that he came across the appellant who immediately stated that the farmhouse in question was her residence as per the contract of rent she produced (Dok ET6⁷). This rental agreement was made between Camelot Properties to her and Raphael Axiak. However, the complainant said that he had never signed this agreement. The police also spoke with the complainant who produced a contract dated 30th April 2002 (Dok ET4⁸) which showed that Propinvest was the sole owner of the property in question and he was its Director. The Complainant explained that he had a relationship with the appellant for many years and that they lived together but the appellant put the locks on the gate and denied him access. When he asked the appellant if she had put the padlocks she said that it was not her who placed them. He also exhibited the statement he took of the appellant which is being marked as Dok ET2.

In cross examination on the 22nd September 2014, the witness stated that during his investigation it had resulted to him that the appellant had some sort of troubled relationship with the parte civile but certainly did not have a copy of the keys of the farm house because she obtained access by breaking the door. Although he did not

⁷ Fol. 40

⁸ Fol. 34

see her break the door open he said that visibly he saw the signs of damage that occurred as a result of forced entry. He said that when his officers went on site there was only the appellant.

PS 1131 Justin Camilleri confirmed that he had accompanied Inspector Taliana to the premises in question on the 26th October 2012 and noted that on the gate which is situated prior to the main door of the farmhouse there were two padlocks which he exhibited as document JC1. He then proceeded inside the house and found the appellant who he recognised in court. He explained that the padlocks were broken with a special tool used by members of the Civil Protection. Inside they found the appellant in the kitchen and they asked her to accompany them to the police station which she did.

PS 905 Alan Buhagiar confirmed that he had gone to investigate a report regarding forced entry into a place 8 Santa Klara, Bahar ic-Caghaq wherein he realised when he arrived that this person had locked herself in due to the fact that he witnessed padlocks on the chain on the front gate preceding the front door. He confirmed that on the place there was the complainant Raphael Axiaq. He confirmed that he had arrested the appellant on previous occasions from this same place because where she used to live for a long time. However on the day of the incident he said that she was living in Msida because whilst she was taking her to the police stating they had passed by her home in Msida so that she could collect some of her personal belongings.

WPC 50 Oriana Spiteri confirmed that she had accompanied the civil protection on the 26th October 2012 to the house in Santa Klara, Bahar ic-Caghaq and she was present when they broke the padlocks. She recognises the appellant as the person who was inside the house when they obtained access therein. She then spoke with her lawyer and accompanied them to the police station. Asked if she state that she had been living there prior to this incident she said that the appellant mention nothing of this sort.

Arthur Grech and **Silvan Portelli** stated that they work at the Civil Protection and on the 26th October, 2012 they had assisted cutting a padlock and a chain with a bolt cropper from a gate that leads to a house number 8, Triq Santa Klara, Bahar ic-Caghaq.

The complainant **Raphael Axiaq** gave evidence under oath and stated that whilst at work he received a phone call from his neighbour Florence Tabone who told him that his front door was open and that she was hearing a lot of noise. He left work and went to his home and found many cars outside and soon realised that his front door had been knocked down. Asked if the appellant used to live in this farmhouse he said that she used to occasionally though she had her own property He said that the last time that she had slept at his place was in August or September 2009 and the police ended up going to his house and escorting her out in hand cuffs He explained that then he saw the appellant in his house walked out and saw her padlock the gate so as to prohibit further access to the house. Asked if the appellant had a copy of the keys of the house he stated that she had stolen a copy of them. He explained that he had bought the property in question in the name of the company Propinvest and that in fact there are two contracts one relating to the house and the other to the garden attached. On being shown the lease agreement given to the police by the appellant he states that it is false and that the signatures on it are not his. Asked if he had access to the house once the appellant out the padlocks he states he would have access only if he broke the padlocks.

Notary John Spiteri confirmed that the contract exhibited in these proceedings was drawn up by himself wherein Raphael Axiaq on behalf of Propinvest Com had bought the farmhouse in Bahar ic-Caghaq from a family Bartolo. He also confirmed that the contract dok JS 1⁹ was drawn up by him regarding a portion of land adjacent to the house in question which Raphael Axiaq bought from Mr and Mrs Bartolo in the year 2002.

PI Quentin Tanti on behalf of MFSA exhibited a copy of the Memorandum of articles and Association of the company Propinvest Limited with the C number 22690 which

⁹ Fol. 106

he marked as dok AT1¹⁰. He confirmed that the Directors of this company are Raphael and Vanessa Axiaq. He also exhibited the Memorandum of Articles and Association of the company Camelot Properties limited¹¹ wherein again Raphael and Vanessa Axiaq are Directors. He also exhibited the Memorandum of Articles and Association of the company Classic Services Ltd¹² and confirmed that Raphael Axiaq is a Director together with others.

The accused gave evidence and denied ever having put the chain and padlock around the gate of the property in question. She said she knew the parte civile because she had a long time relationship with him that lasted 18 years from 1992 till 2012 till she was dragged out of the house she lived in in Bahar ic-Caghaq. She said they lived together she was his common law wife. They had a child together Gabriella and ate and did everything together. They first lived in Ta' L-Ibragg together, then they sold it and lived in rented accommodation until they lived in Bahar ic-Caghaq for ten years together. She exhibited a number of photos which showed her in the presence of the parte civile and a number of them show her in this same house. Every time she went abroad and came back to the island she would go to this same house in Bahar ic-Caghaq as this was her daily residence. She said that she always entered the house with the key. There were two keys one for the wooden door and the other for the metal one and she a copy of both.

On the day in question she remembers that she was in the kitchen having a cup of tea, placed the dirty clothes in the machine and then the police rang the bell and she found them before her . Asked if she put the chain around the gate she replied in the negative and said that she did not even see the damages on the door. Asked how where they caused she said she has no idea. She confirmed that she had shown an empty wardrobe to the police when on site . Asked if she lived in Msida property she said no the Msida property is hers but is used as an office. She insisted on saying that she lived in Bahar ic-Caghaq.

¹⁰ Fol. 114

¹¹ Dok QT2 a fol. 135

¹² Dok QT3 a fol. 250

In her statement, the appellant gives a different version of events a tempo vergine and of relevance to the charge in question is what she states at page 13 namely when asked by the police inspector “ *who put the chains on the gate*” she replied “ *me*” and when further asked “ *so you obstructed ralph from getting inside*” she replied “ *he obstructed me from getting inside in February and I wanted to let him know what it feels what I felt*”. Asked where she lived from last February till the night before she released her stated when replied “ *I actually lived in the office where I lived in Flat 13, Sicasa Court, Tower street Msida.*”

Marianne Galea stated that she was the babysitter of the appellants daughter Gabriella. Asked where she used to baby sit she said in the house of Santa Klara in Bahar ic Caghaq . She said that in this house the appellant lived with her daughter and the parte civile known as Ralph Axiaq. She said that many a time she would keep the girl at her home even when the appellant and Ralph used to travel abroad . She said that both Ralph and the appellant would pick up the girl from her place. She said that she knew Gabriella even when the appellant and Ralph used to live in Ta’ L-Ibragg. She confirmed on oath that she knew the appellant and her daughter before getting to know Ralph. She did not have a copy of the key of the place in Bahar ic-Caghaq.

Svetlana Roukhlianda stated that she had known the appellant and her daughter for many years and she even knew that the appellant had a relationship with Ralph and that they were living together. She stated that she would go and visit them from time to time. . She explained that the day before the incident the appellant had just come back from Sweden and she called her and asked he if she could go over and stay with her and she said it was no problem since she told her that she would go home the following day. On the day in question she asked her to go with her to the house in Bahar ic-Caghaq because she felt threatened from Ralph since he threatened her many times before. The next day she left and she went to meet her at the house in Bahar ic-Caghaq. There was also a man with them in a separate car. She said that they parked outside. The appellant came down from the car opened the door where there was

some mesh and then she proceeded to open the second door. Asked if she saw her open the door she says that he was a bit away but heard the click of the key opening the door. The key turned but the door did not open straight away. They then went to the attic and as she was proceeding to the attic she hurt and started to bleed because some wood gave way. She then left the premises. Asked who the man was who accompanied them on the premises she states that she does not know him. She confirmed that he stayed outside and that the appellant knew who he was and that she brought him over for her security.

Olga Spiteri confirms that she used to work as a maid for the appellant until the year 2006 in her house in Bahar ic-Caghaq. She said that she used to clean the house for Ralph and the appellant and even wash their clothes. They were a couple and even had a business together. She said she was surprised why she was asked to give evidence because it was a known fact that they had this relationship. She said that in the house there was only one bed and Ralph and the appellant used to sleep there. She said that at times he would meet the babysitter Maryanne there too.

Larissa Zarenskaja said that the appellant is her aunt and that she knew about the long relationship she had with ralph Axiaq . She said that she used to visit them often from the age of 11 till she was 33 and got married in 2011. She said that she would sleep downstairs with her cousin Gabriella and her aunt would sleep with Ralph. The last time she visited them was in the year 2009 though they would communicate via skype and thus she could say that they were still livening in that house.

Anthony Tonna, a carpenter gave evidence and stated that he did a lot of works for Ralph and confirmed that he did some works in Bahar ic-Caghaq and that he would take orders both from ralph as well as from the appellant . He confirmed that at the house there would be a young girl too . He would get paid for his work from Ralph.

George Mifsud, explained that he did some electricity works for the appellant and Ralph and confirmed that these would take place in their farm house in Bahar ic-

Caghaq. He said that he would also see them on the ferry going to Gozo together. He said tht generally the appellant would pay him . He also used to work for her in a place in Msida in a flat and ther would be some of her friends there too.

Tatjana Filina gave evidence and explained that she knew the appellant for many years and she also knew Ralph with whom she used to live in a farm house in Bahar ic-Caghaq as a family. She went there many times and at times even her young son who is a friend of Gabriella used to go there.

Considers further,

That it is uncontested that the appellant and the parte civile had right of access to the house in question where they used to live as a family for many years. This was established and proved by many witnesses to a level beyond doubt. Undoubtedly there seems to have been some issues between the couple though on the whole lived happily as a family with the appellants daughter Gabriella receiving friends every now and again.

However with regards to the incident in question the court feels that is should not go very far but limit itself to the statement issued by the same appellant a tempo vergine of the investigation to this case namely when she released the statement in the presence of WPS 50 Oriana Spiteri. It transpires that on that day in question the appellant had admitted that she had put chains around the gate so as to deprive the parte civile from access to his property and this she dis so that he would feel what she felt when he did a similar act a few months before. This confession on behalf of the appellant is tantamount to an admission on her part that she deprived the parte civile from the use of his property.

It seems that Article 85 protects the possession and the use of a thing and not necessarily the property thereof. In fact in **Il-Pulizija v. Joseph Bianco**¹³, the Court of Magistrates held that:

Il-prosekuzzjoni esebiet diversi kuntratti sabiex tipprova it-titolu ta" din l-għalqa u l-Qorti tirrileva li ai fini ta" dan ir-reat m"hemmx lok li jiġi ippruvat it-titolu; huwa neċessarju biss li l-prosekuzzjoni tipprova l-pussess u li tali pussess ġie mfixkel b"azzjoni ta" terzi sabiex b"hekk il-possessor ma setgħax igawdi l-pussess liberu tal-oġġett.

Thus for the purposes of the offence of ragon fattasi the material possession or detention is sufficient. This was judicially acknowledged in **Il-Pulizija v. Mario Bezzina**¹⁴ and **Il-Pulizija v. John Cassar et.**¹⁵ In the former judgement Mr Justice D. Scicluna held that:

*Għall-finijiet tar-reat ta" ragon fattasi "For the purposes of the offence of ragon fattasi "the material possession or detention is enough"(vide Il-Pulizija v. George **Zahra**,¹⁶). A person, who has an object borrowed for its enjoyment, is deemed to have the material possession of the object. Under Article 85 there is no need to prove any other substantial form of possession than this one."*

Therefore it results to this court in a unequivocal manner that the parte civile had access to this house and with the act that was committed by the appellant she deprived him of such access to enjoy his residence . She herself said that she did this act to make him feel what its like to be locked out of your home. Thus it is evident that her intention was purely to make him feel locked out and deprived of his right of enjoyment of his property even if for a short period of time. This was enough to prove the crime in question. It must be emphasised that Article 85 is intended to impede a person from taking the law into his/her own hands. The position between co-possessors as was the case in question is that all the co-possessors should have equal

¹³ Number: 684/2006, 5th March 2010, Court of Magistrates (Gozo) as a Court of Criminal Judicature, Magistrate C. P. Scerri Herrera

¹⁴ Criminal Appeal Number: 42/2004, 26th May 2004, Court of Criminal Appeal (Inferior), Mr Justice D. Scicluna

¹⁵ Criminal Appeal Number: 128/2006, 24th January 2007, Court of Criminal Appeal (Inferior), Mr Justice G. Caruana Demajo

¹⁶ 16th July 1958- Vol XLII.iv. 1453

right of enjoyment, unless it has been provided differently by an agreement between the co-possessors or by an order of a competent authority or a law. The Court explains that the co-possessors should all make equal use of the object held under co-possession

Thus, the court has no reason why to change the judgment delivered by the Magistrate's Courts and thus is confirming the said judgment in its entirety and in so doing is rejecting the appeal of the appellant.

(ft) Consuelo Scerri Herrera

Judge

VERA KOPJA

Franklin Calleja

Deputat Registratur