



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

Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

Criminal Inquiry No.: 103/2016

**The Police
(Inspector Elton Taliana)**

-vs-

Godwin Micallef, holder of identity card number 372875M;

Omissis;

Omissis 1

Today, the 4th day of November, 2019

The Court,

Having seen the charges brought against the accused **Godwin Micallef, Omissis and Omissis 1** for having:

On the 24th February, 2016, at around 03.45hrs in St. George's Street, St. Julian's: -

1. Without the intent to kill or to put the life in manifest jeopardy, caused grievous bodily harm on the person of Nicholas Aquilina
2. For having on the same date, time, place and circumstances took part in an accidental affray and caused bodily harm on the person of Nicholas Aquilina;
3. For having slightly injured Larkin Stafrace;
4. For having on the same date, time, place and circumstances provoked a tumult or an affray for the purpose of committing a homicide or a bodily harm to the detriment of Nicholas Aquilina;
5. For having on the same date, time, place and circumstances wilfully disturbed the public peace and order;
6. Omissis alone for having on the same date, time, place and circumstances operated as a private guard agency or acted as a private guard or offered his services as such, without a licence in accordance with the provisions of Chapter 389 of the Laws of Malta.

Having seen the note by the Attorney General indicating the Articles of Law in terms of Article 370(3)(a) of Chapter IX of the Laws of Malta dated the 12th January, 2018, namely:¹

1. Articles 214 and 218(1)(a)(b) (2) of Chapter 9 of the Laws of Malta;
2. Articles 237(b), 214 and 218(1)(a)(b)(2) of Chapter 9 of the Laws of Malta;
3. Article 214 and 221(1) of Chapter 9 of the Laws of Malta;
4. Articles 238(b), 214 and 218(1)(a)(b)(2) of Chapter 9 of the Laws of Malta;
5. Articles 338 (dd) of Chapter 9 of the Laws of Malta;
6. Articles 3 and 25(a)(b) of Chapter 389 of the Laws of Malta;
7. Articles 17, 23, 31, 49, 50 and 533 of Chapter 9 of the Laws of Malta.

Having heard the accused declare that he does not object to the case being tried summarily by this Court.

Having heard witnesses.

Having seen all the acts and documents exhibited.

¹ Fol. 625

Having heard the prosecution and defence counsel make their submissions.

Considers,

Inspector Elton Taliana testified how on the 24th February, 2016, he was informed by PS845 Ian Vella that there was a fight in Triq San George, Paceville wherein Nicholas Aquilina was allegedly beaten up in front of *Soho Lounge*. Aquilina was taken to Mater Dei Hospital in view of the fact that he had suffered multiple injuries to his face and in other parts of his body. The witness was further informed that Aquilina was accompanied by two other people one of whom was a certain Larkin Stafrace who was also allegedly beaten up and suffered injuries and thus, Stafrace was also escorted to Mater Dei Hospital for further medical assistance. The other person accompanying Nicholas Aquilina and Larkin Stafrace was a certain Godwin McKay. Preliminary investigations by the police revealed that a brawl had taken place in front of Soho Lounge. The first version given to the police was that the manager and some staff from Soho Lounge were involved in this fight and they had beaten up Aquilina. Initially the police didn't exactly know who the people involved in this fight were and thus, they asked for CCTV footages from various bars in the vicinity, amongst which, from Footloose Bar which is situated next to Soho Lounge.

The footage was examined by the police after being retrieved by PS845² wherein³ the period covering 3:30am until 4:15am⁴ captured the whole fight and more importantly it captured that which occurred from 03:40am onwards: *"Omissis was outside Soho and he was pushing Mr Nicholas Aquilina towards Havana area. Nicholas Aquilina went back several times and in fact he tried to jump and punch or kick Mr Godwin Micallef and at that point in time where he missed Mr Godwin Micallef Mr Sasic got him from the back from his neck, like a headlock or something like that, he put him to the ground and there it is clearly seen being **kicked heavily kicked**.....By all of them because Omissis is putting him down with his hand trying to do*

² Fol.42-43

³ **Dok. ETCCTV** a fol. 66

⁴ Request a fol. 65, **Dok.ETR**

something, **the other two kicking him whilst Mr Nicholas Aquilina was on the floor**";⁵ the other two being a reference also to **the accused Micallef**.

In view of this finding the police began investigating *Soho Lounge* staff.⁶ On the 25th February, 2016, the police spoke to Aquilina who had visible bruises on his face unlike the accused who had none.

During cross examination, the witness stated that the request for CCTV footage was made to *Footloose*, *Broaster Chicken*, and *Plush*. He also confirmed that Nicholas Aquilina was extraneous to an initial argument which broke out in *Soho Lounge* between some Libyans and students, wherein he had attempted to defend the Libyans from suffering further injuries by the *Soho Lounge* staff.⁷ The footage shows Aquilina repeatedly trying to attack the accused and at a point in time is seen doing a flying kick aimed at the direction of Micallef whose shirt was torn in the process.⁸

Inspector Taliana confirmed that the brawl then moved to an opposite establishment, *Broaster Chicken*, however this was not captured on any CCTV footage as "**Mr. Godwin Micallef is only seen in front of Soho Lounge**".⁹ He adds "**the CCTV shows clearly that the three accused over here see heavily beating and kicking Mr Nicholas Aquilina when he was on the floor.... What is first it seems the Court and everyone who has the CCTV can say that Omissis was outside Soho and he was pushing Mr Nicholas Aquilina towards Havana area. Nicholas Aquilina went back several times and in fact he tried to jump and punch or kick Mr Godwin Micallef and at that point in time where he missed Mr Godwin Micallef Omissis got him from the back from his neck, like a headlock or something like that, he put him to the ground and there it is clearly seen being kicked heavily kicked By all of them because Omissis is putting him down with his hand trying to do something, the other two kicking him whilst Mr Nicholas Aquilina was on the floor."**¹⁰ In the footage Aquilina is not seen carrying weapons "bare hands he had".¹¹

⁵ Fol.60-61

⁶ Fol.44

⁷ Fol.54

⁸ Fol.55

⁹ Fol.58

¹⁰ Fol.60-61

¹¹ Fol.62

Nicholas Aquilina, the victim, testified how on the 23rd February, 2016, after watching a football match in Paceville, together with his friend Larkin Stafrace and another friend, had returned to Paceville later that evening to meet up with his cousin Godwin McKay.¹² They went to *Hugo's* and afterwards proceeded to *Footloose* and then to *Soho Lounge*.¹³ After about twenty minutes he went outside *Soho Lounge* to smoke a cigarette and witnessed Godwin Micallef and Omissis 1 kicking a man on the floor and immediately went to stop them.¹⁴ The witness said that he realised that one of them was the manager because he was wearing a blazer while the other man was wearing a shirt. *Aquilina tapped the accused on the shoulder and told him "Stop, you are beating him." And he immediately turned around, I still remember his fist and he broke my lip.*¹⁵ Another bouncer whom he could not recognize, began to beat him, *"He got me from my hoodie and I couldn't see anything else. I tried to get myself lose."*¹⁶ Larkin Stafrace attempted to stop the aggressors from beating him yet the same bouncer kicked Larkin in the face. When he was let loose, he saw Larkin hurt on the ground with the accused standing near him and simply looking at him.¹⁷

With the help of some people he picked Larkin up and confronted the accused by asking him: *"Why the beating, we didn't do anything. I only tried to stop you from beating another one, why like this?" I continued to argue, not argue, try to get a reason why. I even put my hands behind my back to show him that I was not going to fight"*¹⁸ Whilst Aquilina was demanding an explanation from a bouncer, Godwin Micallef who was behind Aquilina became annoyed at Aquilina's insistence to get an explanation.¹⁹ Once the bouncer left, Aquilina tried questioning Micallef but *"He punched me in the face again... [Court: Round the left part of your chin]..... And I went back again and told him: "I am trying to reason with you and you punched me again, why are you doing it?" And after a few minutes he*

¹² Fol.115-116

¹³ Fol.116

¹⁴ Fol.116-118

¹⁵ Fol.118

¹⁶ Fol 119

¹⁷ *Ibid.*

¹⁸ Fol.120

¹⁹ Fol.120

did it again.... At the same time, he punched me again. [the left side of your face]".²⁰

Aquilina then explains how Omissis approached him and pushed him off. Larkin went in front of him only to be grabbed by the neck and thrown back by the same Omissis. This is when Aquilina retaliated and ran aggressively towards the accused who crouched so as to protect himself, managing to evade Aquilina's kick.²¹ This caused the latter to lose his balance and fall to the ground. *"I was on the floor, he got me by the neck and started punching me in the face and then another bouncer came to help him and Godwin came punching me, kicking me in the head. And I blacked out at that moment.... He was kicking me in the head, Godwin Micallef. ...With his feet. ...Exactly, I was beaten up by three (3) bouncers I think. It was three (3) bouncers for sure."*²² The victim emphasizes how **he was being hit all over** *"In my body, in my head. In my face.... My lip was already cut. And my eye was bleeding when I stood up.... When I stood up, I had my face, was full of blood. Larkin was trying to grab me but I was dizzy, I did not know what was happening. It was like this, full of blood."*²³ At this point he was at a corner and the accused attempted to get him out of the corner.²⁴ Aquilina tried to pass from a side where there were some stools of *Soho Lounge's* bar, but suddenly he started being beaten up once again. He was kicked in the abdomen by a bouncer and beaten up again before blanking out.²⁵ He was then helped up by McKay and Stafrace and managed to move further down the road towards *Havana*.

As he rested on a wall, he saw a bouncer whom he could not recognize, coming towards him at a hurried pace from the direction of St. Rita steps.²⁶ Scared he ran towards *Broaster Chicken* to hide.²⁷ Omissis and Omissis 1 were with this bouncer but **the accused was not with them.**

²⁰ Fol.122

²¹ Fol.123-124

²² Fol.125

²³ Fol.126

²⁴ Fol.127

²⁵ Fol.129

²⁶ A fol 129

²⁷ Fol.131-132

At *Broaster Chicken* he tried to get to the establishment *Dash* but was prevented from doing so by a security who in an article by Malta Today is named as “*Velico*”.²⁸ With *Velico* there was *Omissis 1* who again began beating him, with kicks and punches. He was subsequently told that whilst lying on the floor he was being hit by a stool.²⁹ He further states that he remembers his cousin shouting for the police although he could not remember where his cousin was.³⁰

The witness stated that as a result of that night’s incident he ended up with stitches on his eyebrow, cheekbone and lip and that he was kept two days in hospital and had to stay home for one week. He had difficulty eating and drinking and could only do so by means of a straw.³¹

The victim proceeded to give a detailed account of that which was appearing on the footage exhibited, explaining the images appearing on the stills which he was given by the police.³² **The first time the accused punched Aquilina is at 03:41:03 and cut his lip.** At 03:41 he approached the manager and asks him why he got punched. This continues until 03:43 when “*The manager grabs me from the shoulders and throws me to the ground.... the manager once again punches me in the face and once again he cuts my lip*”³³03:44 *the manager pushes me once again (third time). This time he breaks my nose.*”. At 03:44:31 he runs towards the accused and tries to kick him but he evades the kick and **Aquilina ends up on the ground with the accused, *Omissis* and *Omissis 1* “*kicking and punching me, leaving me with an open cut under my eyebrows over my eye and bruises [sic: my] head and body... (03:45:09) [all three] can be seen kicking and punching me rapidly and violently.*”³⁴ The court could assess several injuries on Aquilina’s face.**

²⁸ Fol.134-135

²⁹ Fol.138

³⁰ Fol.140

³¹ Fol.142-143

³² Fol.144-145. Dok. NA a fol. 147-149

³³ Fol.147

³⁴ Fol.148

However, the injured party claims that the scar beneath the right eye was a consequence of the beating he suffered at *Broaster Chicken*, a beating in which the accused played no part.³⁵

Larkin Stafrace describes how together with the accused he had returned to Paceville after driving a friend home. They went to *Hugo's* and later met Godwin, Nicholas's cousin.³⁶ After eating at *Broaster*, they proceeded to *Footloose* and then to *Soho Lounge*.³⁷ At a certain point in time he went to the restroom and when he got back he did not see Nicholas but "*U mbghad nisma l-ghajjat gej minn barra. Kif hrigt nara lil Nicholas mal-art. U daruh il-bouncers.*"³⁸ Omissis was kicking and beating Nicholas and when he tried to help him up, he also got beaten up by Omissis. Stafrace fell to the ground and a foreigner helped him up.³⁹ Whilst he laid in a corner he saw Nicholas still on the floor getting punched on the face by Omissis failing to recognize anyone else.⁴⁰ At this time whilst Nicholas was being beaten up he could see the accused looking without attempting to break up the affray "*Ihares biss rajtu jiena*".⁴¹

Stafrace then goes on to explain how Nicholas kept asking his aggressors why they had beaten him up when all of a sudden, he saw him panicking and running towards the establishment *Broaster Chicken* jumping over the counter. He tried chasing him but was stopped by McKay.⁴² He saw Nicholas on the floor with Omissis ¹⁴³ beating him, "*Rajtu jtih bil-ponn u mbghad waqqghu mal-art u beda jtih bis-sieq*"⁴⁴. At that point he looked towards Soho and saw **the accused behind the bar** "*Beda jistahba..... Jiena mort fuqu biex inkellmu u staqsejtu ghalfejn ghamlulu hekk ghax hu m' ghamel xejn*"⁴⁵. *Hu rritalja, ghajjat mieghi.... Qalli: "Itlaqli l barra u tergax tidholli harwn gew."* *Jien bqajt nghidlu u. U hareg lembuba tal-hadid dak il-hin u faqqali daqqa fuq idi,*

³⁵ Fol.141

³⁶ Fol.152

³⁷ Fol.153

³⁸ Fol.154

³⁹ Fol.155

⁴⁰ Fol.156

⁴¹ Fol.157

⁴² Fol.157-159

⁴³ Fol.160

⁴⁴ Fol.159

⁴⁵ Fol.160

*hawn hekk. U jiena nfxilt bl-ugiegh f' idi u tlaqt l hemm jiena. Hrigt. Hadt il-gakketta u hrigt. Kif hrigt, insib lil Nicholas f' nofs tat-triq ma' Godwin. Nicholas kien kwazi mejjet, rajtu jiena, kien bla sahha, bid-demmm niezel kullimkien."*⁴⁶

Godwin McKay⁴⁷ testified how on the night in question he met Nicholas and they went to eat at *Broaster Chicken*. Whilst they were there a fight broke out between securities of *Soho Lounge* and a person who he thought was a Libyan national.⁴⁸ After some time he heard a fight taking place outside and once he went out he "*saw my cousin Nicholas Aquilina getting hit, he was being kicked in the face with the stool...I pulled him away from them and until I did so I got hit twice in my head...I grabbed him and took him away*". **He recognized the accused as one of the persons hitting Nicholas** "*and he tried to push me and he punched me behind my back when I got him...I grabbed Nicholas and he hit me from the side*".⁴⁹ At that time the police arrived and the aggressors ran towards *Soho Lounge*.⁵⁰ On cross-examination he states "*I will tell you what I saw when I went out. I saw my cousin on the ground in front of the gentleman's club and they were kicking him in the face and punching him*". When the commotion started, he was inside.⁵¹ On seeing him he noticed "*his face was already covered in blood, he had a big gash*".⁵²

Charmaine Aquilina,⁵³ Nicholas's mother, exhibited a number of photos⁵⁴ of her son which she took with her mobile phone whilst Nicholas was recovering in hospital.⁵⁵ Similarly she exhibited two photos of Larkin Stafrace.⁵⁶

PS845 Ian Vella testified how whilst on night watch duty in Paceville on the 24th February, 2016, sometime after 4am he received a telephone call stating that there was an argument near *Havana* and that an ambulance

⁴⁶ Fol.161

⁴⁷ Translation into English at fol.559-566

⁴⁸ Fol.560

⁴⁹ Fol.562

⁵⁰ Fol.563

⁵¹ Fol.564

⁵² Fol.565

⁵³ Translation into English at fol.567

⁵⁴ **Dok. CA-CA10** a fol. 182-192

⁵⁵ Fol.180-181

⁵⁶ **Dok. CA11-CA12** a fol 193-194

had been despatched to the scene. On site he saw Nicholas Aquilina and friends of his sitting opposite *Havana*.⁵⁷ He could immediately witness that Aquilina had suffered grievous injuries “*there was a lump on his face.... I saw a swollen and bloody face*”.⁵⁸

Investigations which he carried out, revealed that Nicholas Aquilina had rushed inside *Broaster Chicken* where he was beaten up. At *Broaster Chicken* he spoke to a certain Midolo Carmelo who informed the officer that man entered inside with other men rushing after him. They went inside the kitchen where they punched him and subsequently left.⁵⁹ Later that same day he obtained Aquilina’s version of events.⁶⁰ The **Current Incident Report**⁶¹ was exhibited and confirmed by the witness.⁶² Reproduced he explains that he was given the footage from *Footloose* by a certain Dorian Dalli⁶³ with the latter also confirming that he had done so upon a request by the St. Julian’s Police Station.⁶⁴

Accompanying PS845 when he got to the scene were also **PS1320 Sean Axiaq**⁶⁵ and **PC1052 Brian Tonna**⁶⁶. These officers testified that when they got to the scene, they found 3 youngsters suffering from several injuries.

PS 1543 Oliver Cassar⁶⁷ explained that he had attempted to get Aquilina’s version of events but due to the fact that the victim had his face all bandaged up thus being unable to speak, he had only managed to obtain some information from the victim’s mother.⁶⁸ Cassar confirmed that in the course of investigations he had made several requests to establishments in Paceville to obtain cctv footages.⁶⁹

⁵⁷ Fol.195-196

⁵⁸ Fol.196

⁵⁹ *Ibid.*

⁶⁰ Fol.197

⁶¹ **Dok.IV** a fol. 199 et seq.

⁶² Fol.198

⁶³ Fol.578

⁶⁴ Fol.574

⁶⁵ Fol.594

⁶⁶ Fol.596-597

⁶⁷ Translation into English at fol.569-570

⁶⁸ Fol.203-204

⁶⁹ Fol.591-592

Kyle Vassallo testified that on the day of the incident he had gone to watch a movie with Godwin McKay and after it finished, they met Nicholas Aquilina who was accompanied by some friends.⁷⁰ They decided to go to *Footloose* and then to *Soho Lounge*.⁷¹ All of a sudden he ended up alone and went outside where he saw Nicholas on the floor in the middle of the road “a couple of bouncers kicking him with Nicholas helplessly he can’t do anything there”.⁷² Vassallo could not identify any of these bouncers. The witness’s last recollection of the night’s events was that of Nicholas running towards *Broaster Chicken* and the bouncers running directly after him.⁷³ The next thing he remembers is that together with Godwin McKay he was inside *Broaster Chicken* helping Nicholas to stand up since he was in a bad state and his face was covered in blood having suffered an open wound on his forehead.⁷⁴

Carmelo Midolo testified that on the night in question he was working inside the kitchen at *Broaster Chicken*. A fight had broken out and one of the persons involved in this fight jumped on the table and went in the kitchen whilst four persons followed him and took him outside by grabbing him from his t-shirt.⁷⁵ The witness further stated that Aquilina, whose face was covered with blood, was being punched. Midolo denied that Micallef had gone inside Broaster Chicken.⁷⁶

Shaun Zammit described how on the 24th of February, 2016, he was working on his thesis and needed to buy cigarettes. Since it was around 4am he thought there would be a shop still open in Paceville which was close-by to where he was residing.⁷⁷ He purchased cigarettes from a shop situated beneath *Havana* and as he was leaving, he heard screams. He stopped and saw **four or five people hitting and kicking somebody in the middle of the street**. These men were dressed in black thus leading him to assume they were security personnel.⁷⁸ **The victim was lying on the floor trying to get loose from the people who were hitting**

⁷⁰ Fol.211-212

⁷¹ Fol.213-214

⁷² Fol.215

⁷³ Fol.216-217

⁷⁴ Fol.218

⁷⁵ Fol.264-265

⁷⁶ Fol.272

⁷⁷ Fol.372

⁷⁸ Fol.374

him.⁷⁹ Aquilina was being beaten up by 4-5 people “*With their hands and their feet, both their hands and their feet*”. Aquilina managed to get away from his aggressors and ran into a chicken shop by jumping over the counter, Whilst some of the bouncers who initially took part in the aggression returned to their posts, around 4 or 5 of them ran after him.⁸⁰ He could see that the aggression continued inside this chicken shop where Aquilina continued being beaten up even when he was lying helpless on the ground.⁸¹ Vassallo explained that Aquilina had a big wound on his face. He remained with him until an ambulance was called.⁸²

Dr. Paul Zammit testified how on the 24th of February, 2016, Nicholas Aquilina was admitted to the emergency department and found to be suffering from “*lacerated wound 2cm in his right region...bruising and a haematoma, abrasions over the face and fractures of the nasal bones*”. The laceration remained visible, “*It’s sutured but the mark is still there*”. Dr. Zammit also confirmed⁸³ the medical certificate he had issued⁸⁴ wherein it is stated that the injuries sustained by Aquilina were classified as grievous.⁸⁵

Kurt Mahoney testified and confirmed on oath⁸⁶ the report dated 18th July, 2016.⁸⁷ The said report shows images of the brawl which were downloaded from cctv cameras in the area. **Donald Tabone** reviewed the same footage and testified that from the stills downloaded one can attest to the violent brawl which broke out. The witness was unable to identify the said persons or whether throughout the fight that ensued the persons involved were the same.⁸⁸ The witness concluded it was not entirely possible to distinguish specific faces from the footage that he examined.

⁷⁹ Fol.376

⁸⁰ Fol.377

⁸¹ Fol.378-379

⁸² Fol.382

⁸³ Fol.423

⁸⁴ **Dok.EL1** Fol.29

⁸⁵ Fol.422

⁸⁶ Fol 439

⁸⁷ Fol.304 et seq.

⁸⁸ Fol.471-472; Report **Dok. DT** a fol. 472 et seq.

Dr. Jonathan Joslin was tasked by the Court to examine Aquilina and report on the nature of his injuries. The said examination took place on the 19th November, 2016, wherein the learned expert could assess that Aquilina had *“remaining scars, three of which were visible on the face from a talking distance, one was three centimetres on the right side of the face clearly noted on the photos which were taken by myself. He had another one on the lip itself one centimetre on the left side of the lip and 1.5 centimetres and he had another scar over the left eye of about 1 centimetre. They are compatible with people who have been assaulted and the injuries are grievous because of the deformity that has remained....he had a fracture of the nose, again compatible with blunt trauma, however from examination the nose after all management is at presently straight.”*⁸⁹ Dr. Joslin adds that *“the fracture of the nose that would be grievous per durata and should have healed within the stipulated time frame within three weeks to four weeks. Per durata is for the fracture, the grievous injuries remain because of the scars”*.⁹⁰

The Court of Criminal Appeal in **Il-Pulizija vs Joseph Azzopardi**⁹¹ stated:

Il-kwistjoni ta' jekk offiza hix wahda hafifa u ta' importanza zghira, hafifa, gravi jew gravissima hi wahda ta' fatt u ghalhekk rimessa ghall-gudikant tal-fatt (fil-kaz ta' guri, ghalhekk, rimessa f'idejn il-gurati; fil-kaz odjern rimessa f'idejn il-gudikant ta' l-ewwel grad - il-magistrat - u issa f'idejn l-Imhallef sedenti). Ma hix, ghalhekk, kwistjoni li tiddependi necessarjament jew esklussivament fuq 'opinjoni medika'. It-tabib jew tobba jispjegaw x'irriskontraw bhala fatt; u, jekk il-qorti tippermettilhom, jistghu joffru l-opinjoni taghhom dwar, fost affarijiet ohra, kif setghet giet ikkagunata dik l-offiza, jew ma' x'hiex huma kompatibbli s-sintomi li jkunu gew klinikament riskontrati. Ikun jispetta mbaghad ghall-gudikant tal-fatt li, fid-dawl mhux biss ta' dak li jkun xehed it-tabib izda fi-dawl tal-provi kollha, jiddetermina n-natura ta' l-offiza.

In **Il-Pulizija vs Bernard Briffa u Stephen Catania**⁹² the same Court differently presided had the following considerations to make:⁹³

..... mhux kull lacerazzjoni fil-wicc tista` titqies bhala tali li twassal ghal fregju. Lanqas ma nistghu nghidu li kull marka fil-wicc hija sfregju.....

Illi l-appellanti iressaq lanjanza ohra sussidjarja ghal dik marbuta mal-apprezzament tal-provi meta jilmenta illi ma hemmx prova illi l-griehi sofferti mill-parti leza kienu griehi gravi fit-termini

⁸⁹ Fol.444-445. Vide photographs in **Dok. JJ** a fol.

⁹⁰ Fol.445

⁹¹ Per Hon. Mr. Justice Vincent Degaetano; Dec. 30th July 2004; Appeal No. 193/2003

⁹² Criminal Court of Appeal (Inferior) Judge Edwina Grima , 31/05/2017; Appeal Number 195/2016

⁹³ Per Mdme. Justice Edwina Grima, Dec. 31st May, 2017; Appeal No.195/2016.

ta’-l-artikolu 216(1)(b) billi ma giex ippruvat illi l-lacerazzjoni li soffrew f’wiczom hallielhom marka permanenti. Illi l-Qorti ezaminat mill-gdid ix-xhieda tat-tobba u konsulenti li kienu involuti fil-kura li ircevw iz-zghazagh taljani wara l-agressjoni subita minnhom. Fost id-diversi griehi li sofrew jidher illi kien hemm lacerazzjonijiet fil-wicc li kien jenhtiegilhom il-punti. Issa l-appellanti jikkontendi illi ma hemmx provi fl-atti li jindika illi il-lacerazzjonijiet subiti hallow xi marka permanenti fil-wicc konsistenti fi sfregju biex b’hekk qed ifixkel dak li huwa sfregju fil-wicc mal-mankament fil-wicc u ukoll il-klassifikazzjoni tal-gravita tal-ferita subita. Dan ghaliex **“l-ligi ma tirrikjedix li dana l-isfregju jipperdura ghal xi zmien partikolari; sfregju fil-wicc (jew fl-ghonq jew f’wahda mill-idejn) anke ta’ ftit granet jibqa’ sfregju ghall-finijiet ta’ l-imsemmija disposizzjoni. Il-permanenza ta’ l-isfregju hi rilevanti biss meta abbinata mal-gravita, taghti lok ghal hekk imsejja “offiza gravvissima” skond l-artikolu 218 (1) (b) tal-Kodici Kriminali.”**⁹⁴ Fuq kollox l-**“sfregju, mill-banda l-ohra u a differenza ta’ mankament, hija kull hsara li tista’ ssir fil-regolarita’ tal-wicc, fl-armonija tal-lineamenti tal-wicc, u anke f’dik li hija s-sbuhija tal-wicc. Skond giurisprudenza ormai pacifika, din il-hsara li tammonta ghal sfregju trid tkun vizibbli minn distanza li hi dik “li soltu jkun hemm bejn in-nies meta jtkellmu ma’ xulxin”**⁹⁵. Inghad ukoll illi **“Jekk l-isfregju jkunx semplici jew gravi u permanenti hija kwistjoni ta’ gradazzjoni; imma l-isfregju jkun hemm dejjem, jekk ikun hemm dik ic-cikatrici”**⁹⁶.

The classification of the injuries, namely whether grievous under Article 216 or under Article 218 of the Criminal Code, assumes further relevance in view of the fact that in the note filed by the Attorney General by which he sent the accused for trial under Article 370(3)(a) of the Code, it is Article 237(b) that is cited. This article deals with the offences of bodily harm in an accidental affray which harm produces the effects mentioned in article 218 of the Code.

The Court shall therefore proceed to examine whether this article finds application to the proceedings under review.

The Court of Criminal Appeal (Superior Jurisdiction) examined *funditus* Article 237 in its judgement **Ir-Repubblika ta’ Malta vs Carmel sive Charles Demicoli**.⁹⁷

L-artikolu 237 jikkontempla s-sitwazzjoni fejn issehkh glieda accidentali li fiha xi hadd jinqatel jew issir offiza fuq il-persuna, u l-awtur ma jinsabx.....

Il-Crivellari⁹⁸ jghid:

⁹⁴ **Il-Pulizija vs Fortunato Sultana** – App. Inf 05/02/1998

⁹⁵ **Il-Pulizija vs Paul Spagnol** – App. Inf. 12/09/1996

⁹⁶ **Il-Pulizija vs Emily Zarb** – App. Inf. 15/02/1958

⁹⁷ Per The Hon. Chief Justice Vincent De Gaetano, Mr. Justice David Scicluna and Mr. Justice Joseph Zammit MC Keon; Dec. 2nd September, 2010; Appeal No. Numru 35/2007

“Nella rissa e` avvenuto un omicidio: tutti i corrisanti, se non per volonta` diretta, almeno per volonta` indiretta o per colpa, ne sono responsabili; dunque meritano una pena; non l’ordinaria dell’omicidio, ma straordinaria, appunto perche` e` ignoto colui che materialmente la consumava.

“E`, pero`, regola rigorosa dettata dalla scienza che non possa essere applicata la pena straordinaria se non quando sia assolutamente ignoto l’autore dell’omicidio e non esista a carico di alcuno dei corrisanti preponderanza di prova per crederlo omicida, perche`, in questo caso, dev’essere punito come tale egli solo. *Ictus uniuscumque contemplare oportet*. Vuolsi, inoltre, dalla scienza che, ignoto l’autore dell’omicidio, siano puniti di pena straordinaria solo coloro che si sono impegnati nella rissa.”⁹⁹

Il-Crivellari jirreferi wkoll ghal sentenza tal-Cassazione ta’ Palermo tat-12 ta’ Dicembru 1866 fejn intqal:

“Se fuori del caso della rissa siano a taluno arrecate per mano di piu` feritori, piu` ferite mortali, delle quali pero` una gli tronchi immediatamente la vita, prima che le altre abbiano potuto produrre il loro effetto nocivo, vale a dire la morte, e d’altronde sia certo quale tra i feritori fu l’autore della lesione che cagiono` veramente la morte; questo solo e` tenuto d’omicidio, mentre gli altri devono rispondere di ferimento. Ma se l’uccisione accade in una rissa, tutti i corrisatori che avranno arrecato ferite mortali debbono rispondere dell’omicidio, senza avere riguardo a quella tra le ferite che prima delle altre abbia prodotto la morte.”¹⁰⁰ [sottolinejar tal-Qorti]

Similar reasoning guided the Court of Criminal Appeal in a case of bodily harm having been caused in an accidental affray. In **Il-Pulizija vs Joseph Grech**:¹⁰¹

Illi ghar-rigward tat-tielet aggravju, dan jidher manifestament infondat ghaliex il-koncett kollu tal-“*offesa in rissa*” inkorporat fl-artikolu 237 tal-Kodici Kriminali jiccentra fuq il-fatt li fil-glieda accidentali, jkunu hadu parti fiha kontra l-offiz aktar minn zewg persuni, w, fl-assenza ta’ aggressjoni pjanata jew premeditata mid-diversi persuni li jkunu hadu parti fiha w/jew fl-assenza ta’ l-prekoncert bejnithom biex isir l-omicidju jew l-offiza (ghalhekk l-emfasi hija fuq glieda accidentali), meta ma jkunx maghruf min, minn dawk li jkunu hadu parti attiva fil-glieda **KONTRA I-MAQTUL JEW L-OFFIZ**, attwalment ikun ikkaguna l-offiza jew l-omicidju, allura kull wiehed li jkun ha parti attiva kontra l-offiz jew il-maqtul, ikun responsabbli kriminalment, pero’ s’ intendi ta’ reat li jgib piena inqas gravi minn dik tal-omicidju jew tal-offiza skond il-kaz. Hu ovvju li mill-inqas iridu jkunu hadu parti attiva kontra l-offiz (f’ dan il-kaz) mill-inqas zewg persuni, b’ mod li ma jkunx jista’ jinsab min minnhom kien l-awtur tal-offiza. kif jghid il-

⁹⁸ Giulio Crivellari, **Il Codice Penale per il Regno d’Italia, Vol. VII** (Unione Tipografico – Editrice, Torino, 1896).

⁹⁹ Pagna 961.

¹⁰⁰ Pagna 1001.

¹⁰¹ Per Mr. Justice Joseph Galea Debono, Dec.16th February, 2006; Appeal No.301/2005

CARRARA (“Programma del Corso Di Diritto Penale” Parte Speciale, Vol. I S 1311 p.496), hu bazat fuq l-*“incertezza dell’ autore”*.

Our Courts also had occasion to examine the essence and nature of the offence found in Article 237, highlighting the fact that these offences are found in that part of the Code dealing with excusable offences. The inherent provocation an affray of itself brings about as well as the fact that slight injuries the effects of which, considered both physically and morally, are of small consequence, were issues touched upon by the Court’s in its judgement **Il-Pulizija vs Alfred Debattista**:¹⁰²

...il-Qorti tal-ewwel istanza wza il-kelma “volontarja”. Issa, ghalkemm fil-prattika jinghad pjuttost “offisa in rissa” meta l-kaz jaqa that l-artikolu fuq citat (251), eppure, teknikament, ma hijjex zbaljata affattu l-kelma “volontarja”. Infatti, l-art.251 jinsab appuntu taht is-sub-titolu ta’ l-iskuzi li jinghataw fl-omicidju volontarju u fl-offizi fuq il-persuna volontarji, u dan hu dovut ghall-fatt li, kif gie spjegat funditus fis-sentenza moghtija mill-Imhallef sedenti **Pul.vs. Barbara** 2 Dic.1939 Kollez.XXX.iv.p.631, dik id-disposizzjoni tikkontjeni per se stessa il calor rixal bhala skuzanti, - ta’ liema principju l-imhallef sedenti, fi studji li rega’ ghamel snin wara, sab il-konforma tieghu fil-**Crivellari**, Dt.Crim, Vol.VII p.1002 u 1007. Ghalhekk, galdarba dak l-artikolu hu kompriz, appuntu ghax fih innifsu jikkontjeni li skuzanti tal-passjoni, fis-sub-Titolu ta’ l-iskuzi applikabli ghall-omicidji u offizi fuq il-persuna volontarji, isegwi, logikament, li ma hux skorrett li wiehed jirreferixxi bil-kelma volontarji, ghall-omicidju jew offizi in rissa, anki jekk, fil-prattika, mhux soltu jissejhu hekk, imma jissejhu, aktar komunament, omicidju jew offiza in rissa.

.....

l-ligi maltija ma tirrikonoxxi l-offiza ljevi ta’ importanza zghira bhala xi klassi ta’ offiza distinta mill-offiza ljevi,vuoldiri, non si tratta ta’ kategorija distinta ta’ offiza, imma biss ta’ diversita’ tal-effett taghha.....meta fl-art.251 il-ligi semmiet biss l-offiza hafifa, b’daqshekk kienet qeghda tikkompreni anki l-kaz meta l-effetti taghha jkun ta’ ftit importanza.

In the case before this Court, the evidence manifests that the accused had already attacked Aquilina and thus it is for this reason that any violent reaction on the latter’s part when he charges towards Micallef intending to kick him, can never serve to excuse the said accused’s actions.

Consequently, in the light of these judgements, coupled to the fact that Nicholas Aquilina clearly identified the accused as one of his aggressors, Article 237 of the Criminal Code finds no application to the case under review.

¹⁰² Per Mr. Justice William Harding, Dec. 20th April, 1963; XLVII.iv.1218

Whilst the accused was also charged with having purposely provoked the affray to cause bodily harm in terms of Article 238(b) of the Criminal Code, no evidence was produced to substantiate this offence.

However, what clearly results from the acts of these proceedings is that **the accused embarked on a frenzied attack against Aquilina who as a result suffered multiple scars on his face as well as slight injuries.** Aquilina identified **the accused as the one who repeatedly kicked and punched him in the head whilst he was lying helplessly on the ground, after having fractured his nose and broken his lip on at least two separate occasions.** From the evidence tendered by Aquilina it clearly results that the accused's role in this brawl starts and ends in the street opposite Soho Lounge.

Learned counsel for the defence in final submissions seeks to distinguish between the injuries caused outside *Soho Lounge* and those at *Broaster Kitchen*. Nicholas Aquilina categorically states that the injury caused beneath his right eye, one which the Court finds is tantamount to a bodily harm in terms of Article 218 of the Code, was in no way caused by the accused but occurred whilst he was suffering a beating inside *Broaster Chicken*.¹⁰³ Midolo too excludes that the accused was present when Aquilina was being beaten up at *Broaster Chicken*.

There is no doubt however, that by the time the beating outside Soho Lounge had ended and before it continued inside *Broaster Chicken*, Aquilina had already sustained multiple grievous injuries to which the scars on his face bear witness. Before the incident at *Broaster*, **the accused had been an active participant in the 'gang beating' Aquilina received at the hands of the manager (the accused) and his employees, when the conduct expected from the accused was that of restraining his staff and defending Aquilina rather than conduct himself so despicably!!**

The scars over and beneath Aquilina's left eye and left side of his lips, to which Dr. Joslin makes reference to, are tantamount to permanent disfigurement. Aquilina had "remaining scars, three of which were visible on the face from a talking distance, one was three centimetres on the right side of the face clearly noted on the photos which were taken by myself. He had another one on the lip itself one centimetre on the left side of the lip and 1.5

¹⁰³ Fol.141

*centimetres and he had another scar over the left eye of about 1 centimetre. They are compatible with people who have been assaulted and the injuries are **grievous because of the deformity that has remained**.... he had a fracture of the nose, again compatible with blunt trauma, however from examination the nose after all management is at presently straight.”¹⁰⁴*

When shown the footage Aquilina identifies the instances when he was attacked by the accused: at 03:41:03 the accused is “kicking and punching me and here he cuts my lip for the first time.... 03:43:06 the manager grabs me from the shoulders and throws me to the ground....03:43:48.... the manager once again punches me in the face and once again he cuts my lip¹⁰⁵.....03:44 the manager pushes me once again (third time). This time he breaks my nose.....At 03:44:31 the manager and Omissis 1 joined in kicking and punching me, leaving me with an open cut under my eyebrows over my eye and bruises [sic: my] head and body...(03:45:09) [all three] can be seen kicking and punching me rapidly and violently.”¹⁰⁶ The victim gives a vivid account of the accused’s part in the brawl outside Soho Lounge: **“I still remember his fist and he broke my lip¹⁰⁷ ...He punched me in the face again... And after a few minutes he did it again.... At the same time, he punched me again¹⁰⁸.... Godwin came punching me, kicking me in the head. And I blacked out at that moment...He was kicking me in the head, Godwin Micallef¹⁰⁹ ...I couldn’t handle any more, I was beaten, punched two times, thrown by him [this causing him to make a run for the accused and try to hit him with a flying kick]¹¹⁰.....he got me by the neck and started punching me in the face and then another bouncer came to help him and Godwin came punching me , kicking me in the head. And I blacked out at that moment.... He was kicking me in the head, Godwin Micallef. ...With his feet. ...Exactly, I was beaten up by three (3) bouncers, I think. It was three (3) bouncers for sure¹¹¹ Everywhere. In my body, in my head. In my face.... My lip was already cut. And my eye was bleeding when I stood up¹¹².... When I stood up, I had my face, was full of blood.”**

¹⁰⁴ Fol.444-445. Vide photographs in **Dok. JJ** a fol. 464-467

¹⁰⁵ Fol.147

¹⁰⁶ Fol.148

¹⁰⁷ Fol.118

¹⁰⁸ Fol.122

¹⁰⁹ Fol.125

¹¹⁰ Fol.123

¹¹¹ Fol.125

¹¹² Fol.126

Aquilina indicated he sustained injuries to the left eyelid¹¹³ another injury which Dr. Joslin classifies as grievous.

Consequently, there can be no doubt that **amongst the injuries caused to Aquilina, inter alia by the accused, are injuries (scars on the left side of Aquilina's lips and left eyelid) which were rightly described as causing a deformity on Aquilina's face:** "*Dawn il-griehi kienu fondi bizzejjed biex hallew marka permanenti disgha xhur wara li sar l-incident. Dawn kollha huma visibli 'at a talking distance' u b'hekk huma kklassifikati ta' natura gravi minhabba li huma sfregju. Illi kellu griehi ta' ksur fl-ghadam ta' mniehru kagun ta' blunt trauma Dawn il-griehi huma ikklassifikati bhala gravi per durata.*"¹¹⁴ The images in Dr. Joslin's report depict these injuries clearly thereby dispelling any doubts as to the scarring effect of same.¹¹⁵

Reference is made to a recent decision delivered by the Court of Criminal Appeal, **Il-Pulizija vs Salvinu Vella**:¹¹⁶

17. L-artikolu 216 (1)(b) jikkellem fuq mankament jew sfregju fil-wicc, fil-ghonq jew f'wahda mill-idejn tal-offiz. It test Inkliż juza l-kelma "*hands*" u dan hu ta' ghajjnuna ghad-dibattitu mqanqal mill-imputat meta jghid li la darba l-ligi titkellem fuq l-idejn dan minnu nniffsu jeskludi id-drigh, ossia li l-id ma tinkludix id-drigh. Tajjeb li ssir referenza ghal dak li jinsenja l-Professor Mamo fin-**Notes On Criminal Law** – Revised Edition 1954-1955 pp 228 meta jelenka l-elementi ta' dan ir-reat u jghid: "*Any external injury which detracts from the appearance of the face, or of the neck or of either of the hands – the most conspicuous parts of the human body...*" (Sottolinear tal-Qorti);

18. Meta offiza ggib mankament jew sfregju fill-wicc, l-ghonq jew wahda mill-idejn, dik l-offiza tkun wahda gravi ex artikolu 216(1) (b) tal-Kodici Kriminali anke jekk dak l-isfregju jdum ghal ftit hin. Jekk jipperdura, fejn allura jkun jehtieg ezami vizwali minn distanza mhux ragjonevoli, dak l-isfregju jtgies sfregju gravi fit-termini tal-artikolu 218(1)(b).

22. Tajjeb li in rigward issir referenza ghas-sentenza ta' din il-Qorti tat-28 ta' Marzu 2008, **Il-Pulizija vs Desmond Falzon**, li ccit b'approvazzjoni s-sentenza taghha **Il-Pulizija vs Paul Spagnol** tat-12 ta' Settembru 1996, fejn kien ritenut hekk:

B'mankament ... fil-wicc, il-ligi qed tirreferi ghal kull deterjorament ta' l-aspett tal-wicc li, anke minghajr ma jnissel ribrezz jew ripunjanza, jipproduci sfigurament "cioe' peggioramento d'aspetto notevole o complessivo, o per l'entita' della alterazjoni stessa

¹¹³ Fol.127,

¹¹⁴ Fol.451

¹¹⁵ **Dok.JJ** a fol.465-467

¹¹⁶ Per Mr. Justice Giovanni M Grixti LL.M., LL.D; Appeal Nru. 496/2015. Dec.30th September, 2019

o per l'espressione d'assieme del volto" (Manzini, V., Trattato di Diritto Penali, Volume Ottavo, Cap. XXVIII, p. 235). Sfregju, mill-banda l-ohra u a differenza ta' mankament, hija kull hsara li tista' ssir fir-regolarita' tal-wicc, fl-armonija tal-lineamenti tal-wicc, u anke f'dik il-hija s-sbuhija tal-wicc. Skond gurisprudenza ormaj pacifika, din il-hsara li tammonta ghal sfregju trid tkun vizibbli minn distanza li hi dik 'li soltu jkun hemm bejn in-nies meta jitkellmu ma' xulxin' (Il-Pulizija vs Emily Zarb App Krim. 15/2/58, Kollezz. Deciz. XLII.iv.1245, 1248). Ghalhekk mhix korretta l-proposizzjoni li temergi mill-bran tas-sentenza appena citata, li jekk ikun hemm cikatrici necessarjament hemm sfregju, izda ma jkunx hemm sfregju jekk ikun hemm simplici skolorament tal-gilda. Anke skolorament tal-gilda jista' jipproduci kemm sfregju kif ukoll mankament fil-wicc fis-sens spjegat. Kollox jiddependi mill-entita' tal-hsara; mhux importanti x'tissejjah il-hsara fil-gergo mediku jew popolarment; dak li hu importanti hu l-effett li thalli fuq il-wicc.

19. Naturalment dak li intqal dwar il-wicc huwa ugwalment applikabbli ghall-ghonq u ghall-idejn. Ghalhekk sabiex ikun pruvat l-aspett materjali ta' dan ir-reat mhux necessarju li l-offiza tkun tali li "tista" thalli mankament jew sfregju. Dik il-possibilita' tirrafigura biss fl-ezami tar-reat kontemplat fl-artikolu 216(1)(a). Sabiex tkun skontata l-prova tar-reat kontemplat fl-artikolu 216(1)(b) huwa bizzegjed li l-offiza kienet fuq l-idejn, fl-ghonq jew fuq il-wicc u l-kwistjoni ta' permanenza jew possibilita' jew probabilita' ta' permanenza ma jiccentraw xejn. Dan hu hekk ghaliex il-legislatur donnu jaghti protezzjoni specjali ghal dawk l-estremitajiet tal-gisem li solitament huma dejjem mikxufin u ghaliex mankament jew sfregju fihom igibu magghom il-konsegwenzi naturali u ovvjji fuq l-offiz.

20. Fis-sistema legali tagha, l-offiza fuq il-persuna tista' tkun wahda hafifa u ta' importanza zghira, hafifa, gravi jew gravissima. Issa, kif tajjed imfisser fis-sentenza ta' din il-Qorti fl-ismijiet **Il-Pulizija vs Fortunato Sultana** tal-5 ta' Frar 1998, fost diversi ohrain, il-ligi ma tirrikjedix li l-isfregju jipperdura ghal zi zmien partikolari. Sfregju fil-wicc, fil-ghonq jew f'wahda mill-idejn anke jekk ta' ftit zmien jibqa' sfregju ghall-finijiet ta' l-imsemmija disposizzjoni. Il-permanenza ta' l-isfregju hi relevanti biss meta, abbinata mal-gravita', taghti lok ghal-hekk imsejha "offiza gravissima" skond l-artikolu 218(1)(b) tal-Kodici Kriminali. Ghal-esposizzjoni aktar profonda tal-kwistjoni in tema, tajjed li ssir referenza ukoll ghas-sentenza ta' din il-Qorti deciza fil-15 ta' Frar 2011 fl-ismijiet **Il-Pulizija vs Jonathan Farrugia** fejn oltre s-sentenza citata saret refeneza ghal-diversi sentenzi ohra foshom dik **Il-Pulizija vs Antonio sive Anthony Randich** tat-2 ta' Settembru 1999 kien ritenut hekk:

Kif din il-Qorti kellha l-opportunita' li tirrimarka f'okkazzjonijeit ohra, l-isregju ('disfigurement') fil-wicc (jew fl-ghonq jew fl-id) kontemplat fl-artikolu 216(1)(b) tal-Kodici Kriminali jista' jkun anke ta' natura temporanea, bhal per ezempju, sakemm il-ferita tfiq. Huwa biss fil-kaz tal-hekk imsemmija 'offiza gravissima' fl-artikolu 218(1)(b) li l-ligi tirrikjedi l-permanenza (oltre l-gravita') ta' l-isfregju. Mir-ritratti esibiti din il-Qorti tara li l-ewwel Qorti setghet legalment u ragjonevolment..."

21. Fi kliem iehor, offiza gravi tista' ssehh fuq kull parti tal-gisem, pero' fejn si tratta tal-wicc, l-ghonq jew l-idejn hija dejjem gravi jekk iggib sfregju anka ghal ftit hin kif fuq spjegat. F'kaz ta' permanenza, dik l-offiza tkun gravissima. Issa jekk l-offiza ssir fuq parti ohra tal-gisem il-kwistjoni dwar jekk tkunx wahda hafifa, gravi jew gravissima tiddependi minn jekk tirrientrax f'dak razzat fil-kumpliment tal-artikoli 216, 218 u fin-nuqqas 221(1).

22. Hija l-fehma ta' din il-Qorti illi la darba l-offiza mhix fuq il-wicc, l-ghonq jew l-idejn tal-kwerelant, u la darba ma gabet ebda wahda mill-konsegwenzi msemmija fl-artikoli 216 jew 218 fuq xi parti ohra tal-gisem, l-offiza hija wahda hafifa. Ghalhekk filwaqt li ma tistghax tinsab htija

ta' offiza gravi qed tinsab htija ta' reat anqas gravi u cioe' ta' offiza hafifa fit-termini tal-artikolu 221(1) tal-Kodici Kriminali bl-aggravanti msemmi fis-subartikolu (2). [sottolinejar tal-Qorti]

In view of the foregoing the nasal fracture suffered at the accused's hands is classified as a grievous injury in terms of Article 216(1)(d) of the Criminal Code, whilst the scars sustained to the left side of his lip and over the left eye, also caused by the accused, are injuries which are classified as grievous in terms of Article 218(1)(b) of the Criminal Code given that they led to a permanent disfigurement of Aquilina's face as afore-said.

The same can be said of the scar beneath the right eye, however it results that this injury, which the court also deems it to be one tantamount to a "*serious and permanent disfigurement of the face*", was sustained during the incident which took place at *Broaster Chicken* and as the victim unhesitatingly testifies, the accused was absent from this incident.¹¹⁷

It has already been pointed out that the article cited by the Attorney General in his note of remittal, Article 237(b) of the Criminal Code, finds no application to the case under consideration given the said article only applies when the author/s of an affray is/are unknown.

However, the Court finds that it is article 467(3) of the Code, rendered applicable to proceedings before the Court of Magistrates through Article 525(3) of the Code, which potentially assumes relevance in these proceedings:

(3) Where two or more individuals are indicted as principals in an offence and there is proof that such offence was committed by one or more of them, but there is no proof as to which one of them or which of them committed the offence, it shall be lawful for the jury to find all the accused guilty as accomplices in the offence, if it is proved that all of them took in the offence a part sufficient to render them accomplices.

Saving what has already been determined regarding the injuries suffered by Aquilina in the first incident This provision certainly finds application with regards to the first incident outside Soho Club with regards to the injuries sustained by Aquilina on his left eye given that it

¹¹⁷ Fol.139

has already been determined that it was the accused who broke Aquilina's nose and cut his lip.

With reference to the third charge, whilst learned counsel for the defence did not contest the medical certificate¹¹⁸ issued by Dr. Roberta Bugeja (which classified the injuries inflicted on Larkin Stafrace as slight injuries),¹¹⁹ Stafrace describes how Micallef attacked him with a truncheon: "*harez lembuba tal-hadid dak il-hin u faqqali daqqa fuq idi*,¹²⁰....*Ghamluli x-ray ghax kelli daqqa u kienet minfuha idi*".¹²¹ Dr. Bugeja's findings coupled to the testimony by Larkin Stafrace proves beyond reasonable doubt that **the accused did indeed cause slight injuries to Stafrace.**

In conclusion and after reviewing all the evidence the Court finds that whilst the accused is clearly guilty of the first and third offences, those of causing grievous bodily harm on Aquilina and slight bodily harm on Stafrace, he cannot be found guilty of the second and fourth offences.

Given the overwhelming evidence regarding the screams and commotion which ensued and spilled over the streets outside *Soho Lounge*, the fifth charge was also satisfactorily proven by the prosecution.

In the by note which the accused was sent for trial under Article 370(3)(a) of the Criminal Code, the Attorney General indicated also the offence of acting as a private guard or employing the services of a private guard agency without being duly licensed for this purpose. However, from the charges filed against the accused it clearly results that it was only Omissis who was charged with this offence and not the accused.

With reference to the fifth charge, that of having wilfully disturbed the public good order or the public peace reference is made to the judgement **Il-Pulizija versus Maria Concetta Green** wherein the Court held:¹²²

¹¹⁸ **Dok.EL** a fol.28

¹¹⁹ Vide Minutes of the 6th March, 2017 a fol. 554

¹²⁰ Fol.161

¹²¹ Fol.163

¹²² Court of Criminal Appeal; Dec. 19th November, 1999; Volum LXXXIII.iv.441

L-artikolu 338(dd) tal-Kodici Kriminali jikkontempla r-reat komunement imsejjaħ ‘breach of the peace’. L-elementi ta’ dan ir-reat gew ezaminati funditus f’diversi sentenzi u gie ritenut li, bhala regola, ikun hemm din il-kontravvenzjoni meta jkun hemm ghemil volontarju li minnu nnifsu jew minhabba c-cirkostanzi li fihom dak l-ghamil isehh inissel imqar minimu ta’ nkwiet jew thassib f’mohh persuna (li ma tkunx l-akkuzat jew l-imputat) dwar l-inkolumita’ ta’ persuna jew dwar l-inkolumita’ ta’ proprjeta’, kemm b’rizultat dirett ta’ dak l-ghamil jew minhabba l-possibilita’ ta’ reazzjoni ghal dak l-ghemil.

L-iskambju ta’ kliem, anke jekk ingurjuż jew minaccjuż fih innifsu u minghajr ma jkun hemm xejn aktar x’jindika li dak l-argument jista’ jizviluppa fih, jew iwassal ghal, xi haga ohra u aktar serja (bhal glied bl-idejn jew hsara fil-proprjeta’) ma jammontax ghall-breach of the peace fis-sens tal-artikolu 338(dd) tal-Kodici Kriminali.

Shaun Zammit mentions how *“I heard some screaming, shouting...But then the volume of the screaming increased and I stopped and looked”*.¹²³ Larkin Stafrace states *“U mbghad nisma l-ghajjat gej minn barra. Kif hrigt nara lil Nicholas mal-art. U daruh il-bouncers.”*¹²⁴ This offence has thus been satisfactorily proven.

In the note of remittal made in terms of Article 370(3) of the Code, the Attorney General cites Articles 49 and 50 of the Code. Now as rightly pointed out by learned counsel for the defence in his final submissions, although the prosecution exhibited a judgement delivered against the accused dated the 8th May, 2014,¹²⁵ wherein he condemned to the payment of a fine, no evidence was brought forward to show that the fine so imposed had been paid up.

Reference is also made to the judgement by the Court of Criminal Appeal **II-Pulizija vs Omissis, Jason Galea**:¹²⁶

*Illi madanakollu din il-Qorti tqies illi l-appellanti qatt ma seta jigi misjub hati ta’ l-akkuza tar-
recidiva fit-termini ta’l-artikolu 50 tal-Kapitolu 9 tal-Ligijiet ta’ Malta billi fis-sentenza li issir
referenza ghalha bhala prova tal-addebitu ta’ recidiva u cioe’ dik tat-22 ta’ Jannar 2010, kienet
giet imposta piena pekunjarja konsistenti f’ multa, liema multa mill-fedina penali esebieta in atti
jidher illi thallset fil-05 ta’ Lulju 2012, u kwindi ma jistax jinghad illi s-sentenza kienet giet
“skontata” fit-termini tal-ligi. Kwindi ghalkemm tirrizulta ir-recidiva taht l-artikolu 49, izda l-
artikolu 50 ma huwiex applikabbli ghal kaz.*

¹²³ Fol.374

¹²⁴ A fol 154

¹²⁵ **Dok.ET** a fol. 605-606

¹²⁶ Per Mdme. Justice Edwina Grima, Dec. 31st May, 2017; Appeal No. 434 / 2016

The same Court differently presided in **Il-Pulizija vs Lydon Cutajar**, also held:¹²⁷

Kwantu ghal-multa nflitta permezz tas-sentenza tas-27 ta' April 2011, peress illi jirrizulta illi fis-27 ta' Awissu 2012, din kienet ghadha ma thallsix (ara verbal tas-seduta tal-11 ta' Settembru 2012 u Dok. "MB" a fol. 24 – 26), allura l-piena kienet ghadha ma gietx "skontata", u l-Artikolu 50 mhuwiex applikabbli. Kwindi hu applikabbli biss l-Artikolu 49 tal-Kapitolu 9 tal-Ligijiet ta' Malta fir-rigward biss tas-sentenza msemmija tas-27 ta' April 2011.

More importantly following the Court's considerations in **Il-Pulizija vs Michael Carter** where *inter alia* it stated: "*Fin-nota ta' rinviju ghall-gudizzju skond l-Artikolu 370(3) ma jistghux jizdedu reati li dwarhom ma tkunx saret il-kumpilazzjoni*", given that the prosecution failed to attribute the aggravating factor that the accused was a recidivist, there can be no such finding by this Court.

In its considerations on punishment the Court took into account the nature of the offences of which the accused is being found guilty, his criminal record which shows that he was no first-time offender and the circumstances of the case, *inter alia*, the fact that the co-accused, Omissis and Omissis 1, were awarded suspended sentences following agreement with the Attorney General on the sentence to be awarded in terms of Article 392A(5) of the Criminal Code.¹²⁸ In the said judgements the co-accused were also found guilty of the offence of bodily harm in terms of Article 218 of the Code caused in front of *Broaster Chicken*.

Recently in **Il-Pulizija vs Srdan SIMIC**, the Court of Criminal Appeal held:¹²⁹

Dil-Qorti tagħmel ir-riflessjonijiet segwenti dwar l-istess. Il-ġustifikazzjoni tal-piena fl-eżerċizzju tad-Dritt Penali modern hija pernjata fuq tliet prinċipji kardinali u tiffoka fuq tliet effetti prinċipali, jiġifieri l-effett :

- (a) Retributtiv;
- (b) Preventiv; u

¹²⁷ Per Mr. Justice David Scicluna, Dec. 6th February, 2013

¹²⁸ **Omissis** was sentenced to a term of imprisonment of two (2) years suspended for four (4) years, whilst **Omissis 1** to a term of imprisonment of twenty two (22) months suspended for four (4) years.

¹²⁹ Per Onor. Imhalef Aaron. M. Bugeja; Deciza 5 ta' Settembru, 2019; Appell Nru.430/2018

(c) Riedukattiv jew rijabilitattiv tal-piena

L-**aspett retributtiv** tal-piena huwa, skont il-ġurista Francesco Carnelutti, dak li jservi biex jirristabilixxi is-sitwazzjoni morali soċjali għal kif kienet qabel ma seħħet il-ħsara lis-soċjeta bil-kommissjoni tar-reat. U s-soċjeta teżiġi li l-ħati jagħmel tajjeb għall-azzjoni vjolattiva tad-dritt penali kommissa minnu u li tkun kisret il-paċi u trankwillita' tagħha.

L-**aspett preventiv** tal-piena huwa dak li jrid jassigura li l-piena tkun strument li bih, grazzi għal biża li s-sanzjoni li tkun tista' tingħata tohloq f'moħħ is-soċjeta, b'mod li dak li jkun jerga jaħsibha darbtejn qabel ma jikkommetti reat. Fi kliem ieħor, minħabba l-biża li teħel il-piena, persuna tiġi mgēgħela tixtarr sew il-konsegwenzi t'egħmilha **qabel** ma twettaq l-att kriminuz.

L-aspett preventiv għalhekk huwa dupliċi: wieħed ta' natura ġenerali u l-ieħor ta' natura speċjali. L-effett preventiv ġenerali huwa dak li bis-saħħa tal-liġi penali li tistabilixxi l-piena, is-soċjeta tiġi kemm jista' jkun imrażna milli tikkommetti reati minħabba l-biża li tinkorri fil-piena jekk tinstab ħatja. Aktar ma dik il-piena tiġi applikata fil-prattika, aktar dak l-effett preventiv ġenerali jkun laħaq il-mira tiegħu. L-aspett preventiv speċjali huwa dak li japplika għall-ħati innifsu, li jkun esperjenza fuqu personali l-effetti tal-piena, b'mod li darb'oħra jerga jaħsibha sew qabel ma jagħżel li jikser il-Liġi. Jekk is-soċjeta titef din il-biża mill-piena minħabba li l-Liġi penali tibda' titnaqqar fil-kwalita jew kwantita tal-piena jew inkella minħabba li l-pieni ma jiġux applikati bir-rigurosita dovuta għall-fattispecie tal-każ, allura ma jkun hemm xejn li jġiegħel lill-membri tas-soċjeta milli jiddeżistu għax jekk jiddelinkwu mingħajr konsegwenza jew b'konsegwenza żgħira, isir konvenjenti għall-membri fi ħdan soċjeta li jiddelinkwu. Dan iwassal għal proliferazzjoni ta' delinkwenza b'konsegwenzi nefasti għall-interessi tal-kollektivita'. Is-soċjeta allura teħtieġ li l-piena jkollha aspekt preventiv li jkun effettiv u effikaċi meħtieġ għall-eżistenza paċifika tagħha stess. Altrimenti, il-kollass.

Finalment hemm l-**aspett riedukattiv u rijabilitattiv** tal-piena, li tikkonċentra mhux daqstant fuq l-aspett tal-ħtija speċifika tal-ħati u li għaliha tkun immirata l-azzjoni repressiva tal-piena, daqskemm fuq l-aspett ta' trattament terapewtiku individwali, immirat lejn ir-rijabilitazzjoni tal-ħati. Dan l-aspett rijabilitattiv huwa kruċjali għas-soċjeta in kwantu jgħin lill-ħati jgħaddi minn proċess ta' riforma tiegħu innifsu biex jgħinu jinqata' mir-raġunijiet u l-kundizzjonijiet li jkun wasluh biex jiddelinkwi, billi jagħraf iqum fuq saqajh, jibni ħajtu mill-ġdid u ma jibqax aktar ta' theddida għas-soċjeta bħal meta kien fil-mument meta jkun iddelinkwa.

F'dan il-kuntest il-piena għandu jkollha effetti riedukattivi u korrezzjonali fuq il-ħati. Biex dan l-għan jintlaħaq, il-ħati għandu jsib dawk l-istrutturi maħsuba mill-Istat biex ikun jista' jwettaq dan il-perkors rijabilitattiv u jiġi mgħejjun itejjeb l-imġieba tiegħu b'mod li għalhekk ikun jista' jerga jiġi reintegrat fis-soċjeta, billi jiġi riedukat, imħegġeg ġiżviluppa t-talenti u l-abbiltajiet tiegħu, inkoraġġit jaħdem biex ikollu biex jerga jibni ħajtu u jgħix diċenti, ma jkollux għalfejn jiddelinkwi u jkollu wkoll minn fejn jagħmel tajjeb għad-danni li jkun ikkawża b'egħmilu. F'dan is-sens allura l-Carnelutti jtenni li l-piena hija distinta mill-kastig, għalkemm għandha effikaċja repressiva.

.....

Il-ġurisprudenza tgħalliem li bħala regola, każijiet t'offiżi fuq il-persuna għandhom ikunu puniti b'piena karċerarij effettivi,¹³⁰ u tqis ukoll li anke f'dan il-każ, il-piena idoneja kellha, u għandha tkun dik ta' priġunerija effettiva

.....

Fis-sentenza ta' din il-Qorti kif komposta, iżda diversament presjeduta, fl-ismijiet ***Il-Pulizija vs Ludvic Bugeja*** tad-9 ta' Frar 2011, fuq dan il-punt legali, dik il-Qorti iċċitat mill-***Blackstone*** is-silta segwenti b'riferenza għaċ-ċirkostanzi fejn u meta l-Qrati Ingliżi jkunu propensi jikkonsidraw favorevolment appelli minn pieni li jkunu jidhru maħkuma minn disparita: -

A marked difference in the sentences given to joint offenders is sometimes used as a ground of appeal by the offender receiving the heavier sentence. The approach of the Court of Appeal to such appeals has not been entirely consistent. The dominant line of authority is represented by *Stroud* (1977) 65 Cr App R 150. In his judgment in that case, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal - the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal's view, treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. As his lordship put it, 'The appellant's proposition is that where you have one wrong sentence and one right sentence, this court should produce two wrong sentences. That is a submission which this court cannot accept. Other similar decisions include *Brown* [1975] Crim LR 177, *Hair* [1978] Crim LR 698 and *Weekes* (1980) 74 Cr App R 161.... However, despite the above line of authority, cases continue to occur in which the Court of Appeal seems to regard disparity as at least a factor in whether or not to allow an appeal (see, for example, *Wood* (1983) 5 Cr App R (S) 381). The true position may be that, if the appealed sentence was clearly in the right band, disparity with a co-offender's sentence will be disregarded and any appeal dismissed, but where a sentence was, on any view, somewhat severe, the fact that a co-offender was more leniently dealt with may tip the scales and result in a reduction.

Most cases of disparity arise out of co-offenders being sentenced by different judges on different occasions. Where, however, co-offenders are dealt with together by the same judge, the court may be more willing to allow an appeal on the basis of disparity. The question then is whether the offender sentenced more heavily has been left with 'an understandable and burning sense of grievance' (*Dickinson* [1977] Crim LR 303). If he has, the Court of Appeal will at least consider reducing his sentence. Even so, the prime question remains one of whether the appealed sentence was in itself too severe. Thus, in *Nooy* (1982) 4 Cr App R (S) 308, appeals against terms of 18 months and nine months imposed on N and S at the same time as their almost equally culpable co-offenders received three months were dismissed. Lawton LJ said:

There is authority for saying that if a disparity of sentence is such that appellants have a grievance, that is a factor to be taken into account. Undoubtedly, it is a factor to be

¹³⁰ Ara ***Il-Pulizija vs Mariano Camilleri*** deċiża minn din il-Qorti diversament presjeduta nhar it-8 ta' Frar 2002, kif ukoll ***Il-Pulizija vs Youssef Mbarrek*** deċiża minn din il-Qorti diversament presjeduta nhar l-4 ta' Ġunju 2010.

taken into account, but the important factor for the court to consider is whether the sentences which were in fact passed were the right sentences.”

A further consideration by the Court was the fact that whilst the other co-accused were mere employees, the accused was none other than the manager. His role should have been that of dissuading, nay immediately putting an end to the blatant thuggery by his staff, and not becoming a prime aggressor and willing participant in such a senseless act of brute force and unbridled savagery! He chose to fan the flames instead of acting to extinguish them. Incidents such as these, are sadly becoming all the more frequent and thus the time has come for the message to be driven home that possessing a licence to operate a business does not translate into a licence to use force!

For the said reasons the Court, after seeing Articles 17, 23, 31, 42, 214, 216(1)(b)(d), 218(1)(b)(2), 221(1) and 338(dd) of Chapter IX of the Laws of Malta, finds the defendant **Godwin Micallef** guilty of the first, third and fifth charge brought against him, acquits him of the remaining charges, and condemns him to a term of imprisonment for two (2) years which by virtue of article 28A of Chapter IX of the Laws of Malta, are being suspended for four (4) years.

The Court explained to the accused, in ordinary language, the consequences should he chose to commit another offence within the operative period of this judgement.

In terms of Article 533 of Chapter IX of the Laws of Malta, the defendant is being ordered to pay the sum of € €665.86 representing one third of the expert fees.¹³¹

Moreover, in terms of article 382A of Chapter IX of the Laws of Malta, the Court is issuing a restraining order against the accused in favour of Nicholas Aquilina and Larkin Stafrace for a period of three (3) years.

¹³¹ €1,997.59 being the whole amount.

Finally, in view of the testimony of the victim, the police are being ordered to immediately trace by any means necessary and investigate Mihailo Manic (aka Viliko Blesa Stopalo), bearer of Identity Card No.0133136A, in connection with the assault perpetrated on Nicholas Aquilina on the 24th February, 2016.

Orders a copy of this judgement be transmitted by the Registrar to the Commissioner of Police.

Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)
Magistrate