



## **Criminal Court of Appeal**

**Hon. Judge Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)**

**Appeal Number: 187 / 2020**

**The Police  
(Inspector Mark Mercieca)**

**vs**

**Hussain Abdullahi Jama**

Today the, 18<sup>th</sup> May 2021.

The Court,

Having seen the charges brought against **Hussein Abdullahi Jama** of 22 years, son of Abdullahi and Anna Gahir, born in Somalia on the 1<sup>st</sup> January 1996 with no fixed address in Malta, holder of Maltese ID card number 120410A, accused before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

Herewith on the 14th January, 2018, at around noon in Sliema;

1. Caused grievous injuries on the person of Yunquing Kong as certified by Dr. Daphne Gatt, Med reg 3689 of Mater Dei Hospital; Art.216, 218, Chap 9.

2. And also with having, on the same date, place and circumstances, committed a violent indecent assault on the person of Yunqing Kong; Art. 207, Chap 9.
3. And also with having, on the same date, place and circumstances, without a lawful order from the competent authorities, and saving the cases where the law authorizes private individuals to apprehend offenders, arrested, detained or confined Yunqing Kong against her will. Art 86, 87, Chap 9.
4. In any public place or place open to the public, was found drunk and incapable of taking care of himself; Art. 338 (ff), Chap 9.

The Court is finally being humbly requested, in pronouncing judgement or in any subsequent order, sentence the person convicted to pay the costs incurred in connection with any experts or referee and this in accordance to Art 533 of Chapter 9 of the Laws of Malta.

The Court was also humbly requested to apply articles 383, 384 and 385 of Chapter 9 of the laws of Malta for the security of the victim Yunqing Kong

The Court was also humbly requested to issue a protection order in terms of article 412C of Chapter 9 of the laws of Malta, during the case and in the event of guilt.

The Court is also being humbly requested to deal with Hussein Abdullahi Jama as a recidivist after being found guilty by the Courts of Magistrates of Malta, which judgment became definitive and cannot be altered. Art 49 and 50, Chap 9

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 24<sup>th</sup> September, 2020, whereby the Court upon the unconditional guilty plea registered by the accused charged and after having seen articles 216, 218, 207, 86, 87 (g), 338 (ff), 49, 50, 533, 383, 384, 385, 412 C of Chapter 9 of

the Laws of Malta, found Hussein Abdullahi Jama guilty as charged of the first, second, third and fourth charges brought against him, but acquits him from the charge of recidivism, and condemned him to a term of imprisonment of five (5) years from today, from which there is to be deducted any time served under preventive custody in relation to this case.

Furthermore, the Court, after having seen article 412 D of the Chapter 9 of the Laws of Malta, put Abdullahi Jama Hussein under a Treatment Order so that he may address his alcohol addiction, which order shall be effective for a period of three (3) years from the date of this judgement.

The Court, in order to provide for the security of Yunqing Kong, and after having seen article 412 C of Chapter 9 of the Laws of Malta, provided for a Protection Order against the offender in favour of Yunqing Kong and this for a period of five (5) years from the date of this judgement and prohibits and restricts the offender from contacting, molesting or in any way following the movement of Yunqing Kong.

Furthermore, in terms of Article 533 of Chapter 9 of the Laws of Malta, the Court ordered the offender Hussein Abdullahi Jama to pay to the Registrar, the global sum of € 1,734.68 representing the following sums:

- a. the sum of €170.00 representing costs incurred for the report of expert Dr. Michele Montanaro-Gauci;
- b. the sum of €1,281.48 representing costs incurred for the report of expert Dr. Marisa Cassar.
- c. the sum of €283.20 representing costs incurred for additional report of expert Dr. Marisa Cassar.

The Court ordered that a copy of this judgement be communicated to the Registrar of Courts.

Finally, the Court, after having seen Article 392 A of the Criminal Code ordered that this judgment together with the records of the proceedings be transmitted to the Attorney General within six working days in terms of law.

Having seen the appeal application presented by the Attorney General in the registry of this Court on the 13<sup>th</sup> October, 2020, whereby this Court was requested to, **reform** the said judgment by:

- i) **Confirming** that part wherein the Court found the accused guilty as charged of the first, second, third and fourth charges proffered against him, and acquitted him from the charge of recedivism and condemned him to a term of imprisonment of five (5) years from the day of judgement from which time served under preventive custody is to be deducted;
- ii) **Confirming** also the treatment order for three (3) years as per Article 412D of Chapter 9;
- iii) **Reversing and varying** that part where the Protection Order is issued for the period of five (5) years according to Article 412C of Chapter 9 of the Laws of Malta, and instead binds respondent according to Article 383 of Chapter 9 of the Laws of Malta.

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.

Having seen the grounds for appeal of the Attorney General.

That the Attorney General received the records of these proceedings on the twenty eighth (28th) day of September of the year two thousand and twenty (2020) and whilst exponent agrees with the decision and punishment of imprisonment and Treatment Order, exponent opines that the imposition of a Protection Order under Article 412C of Chapter 9 does not form a sound legal basis, and Article 383 of Chapter 9 should have been applied instead. This is due to the fact that Article 412C refers to a person *“charged or accused with an offence before the court of Magistrates whether as a court of inquiry or as a Court of criminal judicature”* and hence refers to orders by the Court **during the proceedings** whereas Article 383 refers to punishment awarded and hence it refers to decisions that can be awarded.

The Court took note of the appeal filed by the Attorney General where he declared that he was not appealing from the five year prison sentence given by the first court and neither was he appealing from the Treatment Order that was issued for a period of three years but was appealing from the decision of the first court wherein it ordered that a Protection Order is issued for a period of five years according to Article 412C of the laws of Malta.

The Court felt that it was necessary to examine the proceedings before moving on to deal with the appeal application of the accused.

The facts of the case are as follows:

1. On the 14th January 2018, Yunqing Kong was working at a massage parlour in Triq Manoel Dimech, Sliema when at about 11.30am a coloured dark skin man entered her parlour asking for a massage.
2. She told him that she had two prices one of €30 euros if the massage lasts half an hour and €40 euros if the massage was scheduled for an hour.
3. The man accepted to have the massage for an hour.

4. The man together with the alleged victim went into the back room for this massage.
5. The man smelt of alcohol.
6. During the massage somebody knocked at the door and the man got angry and woke up to lock the door and then tried to sexually abuse Yunquing Kong.
7. Yunquing Kong was not interested and resisted him and as a consequence he became violent and started hitting her and stopping her from screaming.
8. As a result of the fornication Yunquing Kong ended up suffering grievous injuries including a broken leg and arm.
9. Her sister came to her rescue together with a friend and a number of police men.
10. Soon after the accused was found in a nearby street namely Tonna street and he was arrested and taken to the Police station.
11. A Magisterial inquiry was held where a number of experts were appointed amongst whom was Dr Marisa Cassar who confirmed that the genetic profile of the accused was found on the intimate clothing of Yunquing Kong.

There is no doubt that the facts of the case are not being contested so much so that the accused registered a guilty plea in the presence of his lawyer before the first court. Also the accused did not present an appeal from the punishment awarded but it is only the Attorney General who filed an appeal on a legal issue. Thus this court shall be deciding this legal issue in this same judgement. The Attorney General together with the accused are not appealing from the five year imprisonment nor from the Treatment Order issued in terms of section 412D of the Criminal Code but ONLY from the issuance of a Protection Order issued in terms of section 412C of the Criminal Code.

Considers further

Article 412C of Chapter 9 of the laws of Malta provides the following:

*'Where a person (hereinafter in this article and in article 412D referred to as "the accused") has been charged or accused with an offence before the Court of Magistrates whether as a court of inquiry or as a court of criminal judicature, the court may, on reasonable grounds, for the purpose of providing for the safety of the injured person or of other individuals or for the keeping of the public peace or for the purpose of protecting the injured person or other individuals from harassment or other conduct which will cause a fear of violence, issue a protection order against the accused'.*

Thus, from a close examination of this article at law it results that this Protection Order can be ordered by the court where the person is 'charged' or 'accused' with an offence before a Courts of Magistrates as a Court of Criminal Inquiry or as a Court of Criminal Judicature and the court has reasonable grounds to believe that it is necessary to provide for the 'safety of the injured person or of other individuals or for the keeping of the public peace or for the purpose of protecting the injured person or other individuals from harassment or other conduct which will cause a fear of violence, issue a protection order against the accused. Therefore, it is imperative that such person is 'charged' or 'accused' and not convicted as is the case is in question.

In this regard reference is made to the judgment in the names **il-Pulizija vs Leonard Cutajar**<sup>1</sup> wherein it was stated that:-

*'Issa l-artikolu 383 tal-Kodici Kriminali ighid car u tond illi "l-qorti tista', meta jidhrilha xieraq, biex tipprovi għas-sigurtà tal-persuna ta' haddiehor jew sabiex jinżamm il-bon-ordni pubbliku, flimkien mal-piena jew minflok il-piena applikabbli għar-reat, torbot lill-ħati b'obbligazzjoni tiegħu nnifsu taħt penali ta' somma ta' flus li tigi iffissata mill-qorti." Dan ma huwiex rifless imbagħad fl-artikolu 412C*

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<sup>1</sup> Deciz fis-27 ta April 2017

*tal-Kodici Kriminali li qabel xejn titkellem fuq il-persuna li tkun giet 'mixlija' jew 'akkuzata' u mhux 'misjuba hatja' fejn il-Qorti ghandha taghti l-motivazzjonijiet taghha 'il ghala ghandha tinhareg tali Ordni fejn ghandhom jittiehdu kont tar-ragunijiet indikati fis-sub-inciz 4. '*

In the judgment by this same Court in the names **il-Pulizija vs Nathaniel Joseph Mammo**<sup>2</sup> the Court with reference to the application article 412C of Chapter 9 riteniet fir rigward tal-applikazzjoni tal-artiklu 412C tal-kap 9 tal-ligijiet ta' Malta is-segwenti:-

*'Illi din il-Qorti f'diversi okkazzjonijiet sahhqet illi l-artikolu 412C isib applikazzjoni biss pendente lite. Dan ghaliex tali Ordni tista' tinhareg biss fil-konfront ta' persuna "akkuzata" u mhux ukoll kontra l-persuna misjuba "hatja" u dan fit-termini ta'l-istess disposizzjoni tal-ligi.*

*Illi l-Qorti ghandha s-setgha biss illi mad-decizjoni finali taghha tordna il-hrug ta' Ordni ta' Trazzin fit-termini tal-artikolu 382A tal-Kapitolu 9 tal-Ligijiet ta' Malta u ghalhekk l-Ordni mahruga fit-termini ta'l-artikolu 412C tal-Kodici Kriminali ma sibx applikazzjoni f'kaz ta' sejbien ta' htija u se tigi revokata'.*

Therefore, in view of the above teachings of the court, this court has no alternative but to condemn all acts of violence and state that such acts should definitely be treated by the Court with a severe punishment in case of guilt especially when such acts of violence are committed on persons who are working in order to earn their living. The court feels that the first court was wrong when it ordered the issuance of a Protection Order in terms of section 412C of the Criminal Code for a period of five (5) years and thus whilst confirming the judgment delivered by the first court with regards to its merits and the punishment delivered being that of five years (5) imprisonment is

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<sup>2</sup> Appell Nru: 49/2019, Deciz nahr it-30 ta Settembru,2020



altering the same judgment and instead of confirming the issuance of the Protection Order for a period of five (5) years in favour of Yunqing Kong is ordering the accused to bind himself not to molest, threaten or annoy Yunqing Kong for a period of one (1) year in terms of section 383(1) of chapter 9 of the laws of Malta and in terms of sub section (3) of section 383(1) of the Criminal Code this period of one year will start to run from the day the accused Hussein Abdullah Jama is released from prison and should he fail to abide by such guarantee then he would be liable to pay the sum of €2,329.37 to the government of Malta.

(ft) Consuelo-Pilar Scerri Herrera

Judge

True Copy

Franklin Calleja

Deputy Registrar