



Court of Magistrates (Gozo)
As a Court of Criminal Judicature

Magistrate Dr. Brigitte Sultana LL.D. LL.M (Cardiff) Adv. Trib.
Eccl.Melit

Police
(Inspector Bernard Charles Spiteri)

vs.

Jabier Alain Rizal Van Der Burg

Case Number: 36/2020

Sitting of Wednesday 7th of July, 2021

The Court,

Having gone through the charges brought against the accused Jabier Alain Rizal Van Der Burg, holder of Maltese Residence permit number 191513A, aged 33 years, son of Gerald and Anna born in Ridderkerk, Holland on the 3rd June 1987 and residing at 54, Lane Pawlu Magri, Number 2, Luqa, the charges being that on the 18th August 2020, at about 6.00pm, whilst being aboard M.V. Ta' Pinu, at Mgarr Harbour limits of Ghajnsielem Gozo and/or in the vicinities:

1. Without the intent to kill or put the life in manifest jeopardy, caused grievous injuries on the person of Moses Briffa as certified by Dr. Gabriel Degiorgio M.D. reg. No. 6089 and this in reach of article 214, 216 and 218 of Chapter 9 of the Laws of Malta.
2. And also with having on the same date, time, place and circumstances wilfully disturbed the public good order or the public peace and this in breach of article 338(dd) of Chapter 9.

The Court has also been requested, in order to provide for the safety of Moses Briffa or for the keeping of the public peace, in addition to or in lieu of the punishment which is applicable to the offence, require the offender to enter into his own recognisance in a sum of money to be fixed by court.

The Court has also been requested to provide for the safety of the injured party by issuing a Protection Order under 412C of Chapter 9.

Notes all the documents exhibited in the acts.

Having seen the Articles of Law sent by the Attorney General (a fol. 108) dated 6th May, 2021, by virtue of which the Attorney General sent the accused to be tried by this court as a Court of Criminal Jurisdiction after deeming that from the preliminary investigation there might result an offence or offences under the following provisions of the law:

- i) Articles 214, 215, 216, 218(1)(b) and 218(2) of the Criminal Code, Chapter 9 of the Laws of Malta;
- ii) Article 338(dd) of the Criminal Code, Chapter 9 of the Laws of Malta;
- iii) Articles 17, 31, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta;
- iv) Articles 383, 384, 385, 386, 387 and 412 C of the Criminal Code, Chapter 9 of the Laws of Malta

Noted also that during the sitting of the 11th May, 2021 (a fol 110), the Articles of Law sent by the Attorney General on the 6th May, 2021, were read out in Court and it was duly recorded in the acts of this case that the accused declared that he has no objection to the case being tried summarily by this Court.

Noted also that during the sitting held on the 11th May, 2021 the accused gave his testimony voluntarily and willingly.

Heard all the witnesses brought forth by the prosecution.

Heard that the mother of the accused Anna Umarella stated that she wanted to give her testimony in court both willingly and voluntarily.

Heard also the final oral submissions made by the prosecuting officer and the defense counsel.

Considers:

The Court shall first and foremost outline the facts of the case as presented to it through the various witnesses.

According to the prosecuting officer, Inspector Bernard Charles Spiteri¹ on the 18th August, 2020 an argument broke out on board of the vessel MV Ta' Pinu. The Inspector told the court that he was informed by the Sergeant on duty that two men were involved in this argument which followed an incident which had taken place earlier on when the accused was in the course of purchasing tickets to board

¹ Fol 32 to fol 34

the ferry and accidentally hit the other gentleman, Moses Briffa with the car side mirror as he too was purchasing the ferry ticket. The Inspector further stated that from the information relayed to him it appeared that Moses Briffa was later on hit by the accused whilst the two of them were on board the ferry and as a result Mr. Briffa had to be hospitalised as he had sustained grievous injuries.

Inspector Spiteri stated that the accused was questioned by the police and kept in custody. The accused also refused to consult a lawyer and gave a statement to the police. From the statement it transpires that the accused admitted to hitting Moses Briffa by mistake and that he did not know Mr. Briffa. He related that it was Mr. Briffa who assaulted him on the ferry and after he managed to push Mr. Briffa away the latter once again attacked him but the accused was faster in defending himself and somehow Briffa fell to the ground.

Then the Inspector gave a description of the footage he himself watched which footage was taken from the camera mounted on the ferry. According to this officer the accused drove on the ferry and parked his car. Mr Briffa too boarded the ferry on his motorcycle and parked at the rear end of the vessel. Mr. Briffa then started looking for the accused. The officer informed the court that the argument however is not captured on camera.

The mother of the accused Anna Umarella gave evidence on the 19th August 2020². She stated that she was willingly and voluntarily giving her testimony in court. She recounted how her son, the accused, accidentally hit Mr. Briffa with the side mirror of the car whilst Mr. Briffa was purchasing his ticket after he jumped the queue. When they were on the ferry she then saw Mr Briffa approaching them. Mr. Briffa was very aggressive and tried to punch the accused who punched back. That is when Mr. Briffa fell to the ground. The witness stated that her son wanted to defend her and his nephew and niece who are very young and who were with them during that time. She added that both herself and her son assisted Mr Briffa and stayed with him throughout until the medical team arrived.

Another witness in this case was Dr. Gabriel Degiorgio, the doctor who attended Mr. Briffa in hospital³. This witness stated that when he examined Mr. Briffa he encountered a laceration on the right parietal region of the head. It was 4cm long and required sutures as it was quite deep. He stated that there were no further complications from that laceration.

There was also a small superficial abrasion over the left zygomatic arch which did not require any further medical attention.

² Fol17 to fol 21

³ Fol 60 to fol 70

The patient had to undergo a CT Scan since he had fallen unconscious following his fall on the vessel. The CT Scan was carried out since the patient had passed out. From the scan it resulted that Mr. Briffa had some soft tissue swelling as well as a small haematoma in the right parietoaxial region. He further added that he had reported the injury as grievous because of the small haematoma since that might lead to further blood oozing in the brain which could lead to death –even though in this specific case none of that occurred.

Mr. Briffa was not given a follow up appointment. Dr. Degiorgio also stated that the wounds in this case did not cause any deformity or disfigurement of the face, and that the healing period is within 30 days.

Moses Briffa took the witness stand on the 26th February, 2021⁴. Mr. Briffa recounted the events as they happened. He stated that he parked the motorcycle by the side near the ticket booth at Mgarr Gozo and proceeded towards the booth to purchase the tickets. The accused was driving a car and came from behind and hit him with the car side mirror. He stated that when he boarded the ferry he saw the accused looking at him so he walked up to him to find out what he wanted and that is when he was punched. He said that when he was punched he passed out and does not recall anything.

⁴ Fol 88 to fol 98

On counter examination, Mr. Briffa confirms that after he was slightly hit by the car mirror, none of the persons in the car got out. He also confirmed that the accused was parked at the front as he saw him beside the rear of the car. According to this witness, he boarded the ferry before the accused. He added that the accused parked his car on the right hand side of the ferry at the front. Mr. Briffa stated also that he did not see the accused with any children by his side.

He further added that after being discharged from hospital he was driven to Gozo from where he collected his motorcycle and drove himself down back to Malta and two weeks after the incident he was back to work.

The court also watched attentively the footages downloaded from the camera near the ticket booth at Mgarr booth facility as well as that downloaded from the camera on the ferry Ta' Pinu.

Considers further.

Before proceeding to examine each offence with which the accused is charged this Court would like to make the following considerations which in its opinion are crucial to this case.

The first point of relevance is that the prosecution has the onus to present to this Court the best evidence in order to convince the court that the offences with which the accused is being charged have been actually committed by him. Indeed the eminent Italian jurist Manzini⁵ wrote :

“Il così detto onero della prova, cioè il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit” .

Infact in cases such as this one – where the proceedings are criminal in nature – the fundamental principle is that for the accused to be declared guilty of the charges brought against him, the degree of proof presented to the court has to be beyond any doubt dictated by reason.

The court here makes reference to a judgement delivered by the Court of Criminal Appeal⁶ wherein it was held that even the slightest of doubts is enough to justify the accused being found not guilty of the charges brought against him. The same conclusion was reached by the Court of Criminal Appeal in the case “**Il-Pulizija vs. Peter Ebejer**”⁷. Indeed it has been consistently held that any shadow of doubt undermines the principle of “beyond reasonable doubt”.

⁵ Diritto Penale (Vol. III, Kap. IV, pagna 234, Edizione 1890)

⁶ Il-Pulizija vs Philip Zammit et, deciza 7 ta' Settembru, 1994

⁷ Deciza 5 ta' Dicembru, 1997.

This therefore means that the Court has the duty to consider all the salient facts of the case presented to it by the Prosecution, apply its reasonable judgement and be morally convinced of the proof before it. This process was described by Lord Denning as:

*“Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it is possible but not in the least probable’ the case is proved beyond reasonable doubt, but nothing shall of that will suffice”.*⁸

As to the facts of the present case, as already stated earlier on in this judgement, the Court heard all the witnesses and their recounting of the events. It also examined the footage attentively. It is the opinion of this court that whilst a testimony given *viva voce* cannot be discounted or ignored yet a testimony is always subjective as it is a statement of facts as seen through the eyes of witness, hence an interpretation of facts by an individual. The same cannot be said of a footage which provides the Court with facts *a tempo vergine* – as they happened and so this court shall be giving more weight to the camera footage than the testimonies rendered before it.

In the present case, from the footage downloaded from the camera at the ticket booth, the Court could see that whilst the accused was

⁸ Miller vs Minister of Pension, 1974 – 2 ALL ER 372

inching slowly towards the ticket booth to purchase the ferry tickets, Mr. Briffa came round from the back, on foot, with the intention to purchase the ticket too. It is very pertinent to point out that in front of the booth there is no pedestrian walkway or pavement and indeed the ledge just outside the booth is very narrow and this for the simple reason that, that particular area is meant for vehicles to be driven up to the window and the driver pays the fare. So much so that to be able to do that just that - payment of the fare - the driver of a vehicle has to come up close to the ledge otherwise he would not be able to hand the money over to the attendant inside the booth.

It is the opinion of this Court that Mr. Briffa should not have parked the motorcycle and walked over to the booth. He should have driven the motorcycle up to the booth after awaiting his turn to pay. The Court believes that Mr. Briffa parked the motorcycle and walked up to the booth intending to jump the queue.

This very specific action was picked up by the accused who felt aggrieved that Mr. Briffa was not awaiting his turn. It should be appreciated that the accused is Dutch and hence not quite accustomed to people jumping the queue and not observing such a simple rule. The Court believes the accused's mother when she stated that her son was frustrated and spoke to Mr. Briffa in Dutch asking him to observe such a simple rule.

The Court also noticed that the accused brushed against Mr. Briffa's rear with the side mirror. This happened because Mr. Briffa sandwiched himself between the car and the booth. He was too intent on getting the ticket before anyone else.

The incident however did not stop there and from the footage downloaded from the camera on the ferry *Ta Pinu* it is very clear to this Court that Mr. Briffa drove onto the ferry AFTER the accused. The footage contradicts Mr. Briffa's testimony. In the footage Mr. Briffa is seen parking his motorcycle at the rear end of the ferry, alighting the motorcycle, removing his face mask and actively looking for someone. The version given by the accused also confirms this. The Court notes how Mr. Briffa was looking around. The Court does believe that Mr. Briffa did eventually identify the accused and walk up to him. The Court could also appreciate the menacing air adopted by Mr. Briffa, even though he stated otherwise during his testimony.

On examining the versions presented to this court it is clear that the version rendered by the accused and that given by Mr. Briffa are conflicting. In the case **Il-Pulizija vs. Graham Charles Ducker**⁹, the Court of Criminal Appeal held that :

"It is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to

⁹ Deciza 19 ta' Mejju, 1997

judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one”.

In another judgement by the Court of Criminal Appeal **Il-Pulizija vs. Martin Mark Ciappara**¹⁰ the court explained that when the Court is faced with conflicting versions, then the Court has to either declare the accused not guilty for want of sufficient evidence provided by the Prosecution or else if the Court is morally convinced of that the accused is guilty then it should find the accused guilty of the charges.

In another judgement **Il-Pulizija vs. Jonathan Micallef**¹¹ the Court of Criminal Appeal held that :

“Huwa minnu illi jista’ jkollok sitwazzjoni fejn numru ta’ xhieda qeghdin jaghtu verzjoni differenti minn ohrajn illi xehdu qabel. B’daqshekk ma jfissirx illi ghax hemm xhieda differenti bil-fors hemm konflitt li ghandha twassal ghal liberatorja. Fil-kawza Pulizija vs. Joseph Thorn deciza mill-Qorti ta’ l-Appell Kriminali fid-9 ta’ Lulju 2003, il- Qorti qalet ‘... mhux kull konflitt fil-provi ghandu awtomatikament iwassal ghal liberazzjoni tal-persuna akkuzata. Imma l-Qorti f’kaz ta’ konflitt ta’ provi, trid tevalwa il-provi skond il-kriterji annuncjati fl-Artikolu 637 tal-Kap. 9 u tasal ghal konkluzzjoni dwar lil min trid temmen u f’hiex trid temmen jew ma temminx’ (ara wkoll Repubblica ta’ Malta vs. Dennis Pandolfino 19 t’ Ottubru 2006).”

¹⁰ Judgement delivered 9th September, 2002

¹¹ Judgement delivered 2nd February, 2012

As already pointed out supra whereas from the footage the Court could not see the accused at all, however the Court could note Mr. Briffa's demeanour and gait. His body language was clear in that he was without any doubt looking for someone specific. The Court could note that he was looking cars up and down and actively searching. This footage also contradicts the recounting of events given by Mr. Briffa and for this reason the Court deems this witness as not credible.

As already pointed out the footage does not capture how Mr. Briffa ended up unconscious, nor does it show who of the two –Mr. Briffa and the accused - released the first punch, yet this Court after witnessing Mr. Briffa's behaviour once on board, is convinced that it was Mr. Briffa who approached the accused. The Court also notes that from where Moses Briffa parked his motorcycle he could easily have gone upstairs on deck and continued his crossing in peace. Instead he chose to seek out the accused. Such a decision led to the argument, which in the opinion of the court is what Mr Briffa actively intended to achieve.

Considers.

First Offence - (Grevious injuries on the person of Moses Briffa):

Here the accused is being charged that without the intent to kill or put the life in manifest jeopardy, he caused grievous injuries on the person of Moses Briffa and this as certified by Dr. Gabriel Degiorgio.

The Court first of all would like to point out that as was decided by the Court of Criminal Appeal in the case **Il-Pulizija vs. Generoso Sammut**¹²:

“Hi żbaljata l-idea, spiss ventilata, li biex issir il-prova skont il-Liġi u sal-grad li trid il-Liġi ta’ offiża fuq il-persuna hemm bżonn ta’ ċertifikat mediku jew tad-depożizzjoni ta’ tabib. Tali ċertifikat jew depożizzjoni jistgħu jkunu meħtieġa jekk mid-depożizzjoni ta’ xhieda oħra, inklużi l-parti offiża, jibqala’ xi dubju raġonevoli dwar jekk verament kienx hemm offiża fuq il-persuna u jew tat-tip jew natura ta’ dik l-offiża”.

In another judgement ¹³the Court of Criminal Appeal the court held that :

“Il-kwistjoni ta’ jekk offiża hiex wahda hafifa u ta’ importanza zghira, hafifa, gravi jew gravissima hi wahda ta’ fatt u għalhekk rimessa għall-Gudikant tal-fatt (fil-kaz ta’ guri, għalhekk, rimessa f’idejn il-gurati; fil-kaz odjern rimessa f’idejn il-Gudikant ta’ l-ewwel grad...). Ma hix, għalhekk, kwistjoni, li tiddependi necessarjament jew esklussivament fuq “opinjoni medika”. It-tabib jew tobbja jispjegaw x’irriskontraw bhala fatt; u, jekk il-Qorti tippermettilhom, jistgħu joffru l-opinjoni tagħhom dwar, fost affarijiet oħra,

¹² Judgement delivered on 2nd August 1999

¹³ Il-Pulizija vs Joseph Azzopardi, judgement delivered on 30th July 2004

kif setghet giet ikkagunata dik l-offiza, jew ma' xiex 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 fid-dawl tal-provi kollha, jiddetermina n-natura ta' l-offiza".

Furthermore the Court notes that in criminal proceedings the charges have to be proven beyond reasonable doubt by the Prosecution. On the other hand, the onus placed on the accused is to bring forward evidence to convince the Court that on a balance of probabilities what he is stating is the truth. Hence, this Court after considering **all** the facts presented to it the court deems that the elements of this offence have not been proven and therefore it cannot find the accused guilty of the first (1st.) charge brought against him on the basis only of the version given by injured party. Hence, the accused will be acquitted from the first (1st.) charge brought against him.

As regards the second (2nd.) charge brought against the accused, from the Acts of the Case it has not been proven that the accused had breached the public order and peace and for the same reasons mentioned above, the Court will be acquitting the accused even from this charge.

Consequently, the Court, due to lack of sufficient evidence at law, does not find the accused Jabier Alain Rizal Van Der Burg guilty of all

the charges brought against him and hence acquits him from all the said charges.

(sgd) Dr. Brigitte Sultana
Magistrate

(sgd) Dorianne Cordina
Deputy Registrar

True Copy

For The Registrar