



## **QORTI TA' L-APPELL KRIMINALI**

**S.T.O. PRIM IMHALLEF  
VINCENT DE GAETANO**

Seduta tal-5 ta' Dicembru, 2003

Appell Kriminali Numru. 146/2003

**The Police**

**v.**

**Jane Deguara**

The Court:

Having seen the charge preferred by the Executive Police against Jane Deguara, to wit the charge (brought on the complaint of Joseph Deguara) of having on the 20<sup>th</sup> May, 2003 at about 14.30 hrs without the intent to steal or to cause any wrongful damage, but only, in the exercise of a pretended right by her own authority disturbed the possession of anything enjoyed by another person, or in any other manner unlawfully interfered with the property of another person, by changing the door lock of premises at 2 Alley 1, Mtarfa Road, Mtarfa which premises connect to premises No. 39, Mtarfa Road Mtarfa which door was locked from the inside in such way as to prohibit Joseph Deguara from living within up to such date;

Having seen the judgement of the Court of Magistrates (Malta) of the 16<sup>th</sup> July 2003 whereby that court found the said Jane Deguara guilty as charged and sentenced her to a fine (multa) of one hundred liri (Lm100);

Having seen the request for the stay of execution of the judgement made by the same said Jane Deguara on the 16<sup>th</sup> July, 2003; having seen her appeal application filed on the 21<sup>st</sup> July, 2003 whereby she requested the revocation of the said judgement;

Having seen the record of the case; having heard the evidence and having heard counsel for the appellant and for the respondent Attorney General; considers:

From the evidence it transpires that appellant and her husband Joseph had purchased, with appellant's mother's money, the premises mentioned in the writ of summons, that is the house in Mtarfa Road, Mtarfa, which however has also another entrance from Alley 1 in the said Mtarfa Road. For a number of years appellant's mother was living in this house, without paying rent. At one point, however, appellant's mother moved out of this house because it was in a state of disrepair, whereupon Joseph Deguara -- who claims that the property is owned jointly by him and his wife in spite of the fact that it was purchased with appellant's mother's money -- gained access into the said house through a window on the 12<sup>th</sup> of March of this year, and proceeded to do up the house so as to live in it (at the moment he and appellant are involved in court litigation for the purpose of separation). At that time only appellant's mother and appellant herself had the keys to the house. Joseph Deguara also changed the locks to both doors to the house and placed a notice outside the door (it is not clear from the evidence outside which door) to advise his wife that he had changed the locks so that, in his words, "there would not be a lot of panic". Upon discovering all of this, appellant lodged a complaint with the Police, who charged Joseph Deguara with the arbitrary exercise of a pretended right. On the day that Joseph Deguara had to appear in court -- 20<sup>th</sup> May of

this year -- he handed a set of keys to his wife so as to put her again in joint possession of the house; but when he went later to enter the house he found that his wife had again changed the lock to the door in Alley 1 (the other door could in any case not be opened because it was secured from the inside by an iron bar), with the result that he was unable to get inside.

Appellant claims that what she did does not amount to the arbitrary exercise of a pretended right in violation of Section 85 of the Criminal Code. She claims that since her husband had gained possession of the house in an arbitrary way, all that she had done was to put her mother back in sole possession of the house, in other words, to revert to the *status quo ante*.

This Court cannot, in the instant case, accept this argument. It is true that doctrine has long since laid down the rules expressed in the maxims *vim vi repellere licet* and *qui continuat non attentat*. As Giulio Crivellari states in *Il Codice Penale per il Regno d'Italia interpretato sulla scorta ecc.* UTET, 1895:

***“La massima vim vi repellere licet, come l'altra qui continuat non attentat...escludono l'esercizio arbitrario. Egli e` percio` che se per togliere il mio diritto di passaggio si erigera` una siepe, in quello stesso momento avro` diritto di abbatterla, allora respingero` un arbitrio, ma non commettero` mai un atto arbitrario.”***<sup>1</sup>

Likewise Francesco Antolisei<sup>2</sup>:

***“L'ordinamento giuridico, infatti, ai fini della pace sociale, consente l'autotutela nei casi in cui si verifica il pericolo attuale di un attacco ingiusto, il che tradizionalmente viene espresso col principio generale vim vi repellere licet, e, nel caso specifico, con l'antica massima qui continuat non attentat. Pertanto, non commette esercizio arbitrario il***

<sup>1</sup> *op. cit.* Vol. VI page 751 (para. 303).

<sup>2</sup> *Manuale di Diritto Penale – Parte Speciale II* Giuffre` (Milano), 1986.

***possessore di un fondo che, usando violenza, si oppone a taluno che violentemente cerca di occupare il fondo stesso. Nel conflitto delle pretese prevale l'interesse del possessore.***"<sup>3</sup>

It is clear from the above, however, that for the principles contained in these salutary maxims to be applicable, the opposition to the threatened spoliation or the retaking of possession must be immediate. Thus, for instance, if the landlord has forcibly evicted the person in possession of the premises by changing the lock to the door of the said premises while the possessor was out, the latter may, on returning in the evening force again the new lock and retake possession of the premises. He would not be guilty of the offence under Section 85 of the Criminal Code. But if the person who was in actual possession does nothing as soon as he becomes aware of the change, he cannot return two, three or four days later and break into the premises in exercise of his pretended right to re-acquire possession of the place. The *raison d'être* for the principles above mentioned is that because of the actual threat of spoliation one cannot have recourse to the proper authorities – one has acted immediately to retain or to re-acquire possession. But if there is a certain lapse of time, then the law requires reference to the proper authorities. Moreover, for the principle *qui continuat non attentat* to apply, the person must actually be maintaining the *status quo* and acting strictly within the limits of the right or of the possession that he actually enjoys, and not enlarging upon that right or upon that possession.

In the case of appellant, even if one were to concede -- but only for the sake of argument, since appellant was not in actual possession of the house in question at the time that her husband broke into it, and the said house is not the matrimonial home -- that she had an equal right of access to the house in Mtarfa Road, the lapse of time between the date when her husband gained entry into the house and when she actually changed again the lock to exclude her husband -- a period of almost two months --

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<sup>3</sup> *op. cit.* page 966.

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certainly renders inapplicable the principles above mentioned. If appellant's husband committed an arbitrary exercise of a pretended right on the 12<sup>th</sup> March, appellant equally committed the same offence on the 20<sup>th</sup> May.

For these reasons this Court dismisses the appeal and confirms the judgement of the first court.

**< Sentenza Finali >**

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