



MALTA

**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE DR.
LAURENCE QUINTANO**

Sitting of the 19 th October, 2005

Number. 802/2005

The Executive Police

(Inspector Silvio Valletta and Inspector Jeffrey Cilia)

versus

Bernard Pintaric

The Court

1. Having seen the charges made against Bernard Pintaric, 30 years old, son of Stjepan and Maria born in Australia on the 3rd October, 1974 holder of an unknown Passport Number that

On the 7th September 2005 at some time in the evening at Ta' Qali National Football Stadium

a) without intent to kill or to put the life of any person in jeopardy, caused harm to the body or health of various

police officers and other persons, which such bodily harm is deemed to be grievous that can give rise to danger of any permanent debility of the health or permanent functional debility of any organ of the body or any permanent defect in any part of the physical structure of the body or causes any deformity or disfigurement in the face, neck or either of the hands of the persons injured or causes any mental or physical infirmity lasting for a period of thirty days or more (article 214, 215, 216 of Chapter 9)

b) and also with having on the same date, time, place and circumstances taken an active part in an accidental affray wherein a grievous bodily harm was committed and it is not known who was the author thereof (article 237 (c) of Chapter 9);

c) and moreover with having on the same date, time and place and circumstances taken an active part in an assembly of ten or more persons for the purpose of committing an offence, although the said assembly may not have been incited by any one in particular, which offence which such assembly of persons intended to commit was committed (article 68(2)(3) of Chapter 9;

d) and with having on the same date, time, place and circumstance reviled, or threatened, or caused a bodily harm to any person namely several police officers lawfully charged with a public duty, while in the act of discharging their duty or because of their having discharged such duty (article 95 of Chapter 9);

e) and furthermore with having on the same date, time, place and circumstances assaulted or resisted by violence or active force not amounting to public violence, any person lawfully charged with a public duty namely several police officers, when in the execution of the law or a lawful order issued by a competent authority where the assault or resistance was committed by three persons or more (article 96(b) of Chapter 9).

f) And also with having on the same date, time, place and circumstances wilfully committed any spoil, damage or

injury to or upon any movable or immovable property belonging to any other person that is to the detriment of the Malta Football Association (MFA) which amount of damages exceeds five hundred Malta Liri (Article 325 of Chapter 9).

g) And moreover with having on the same date, time, place and circumstances in any manner wilfully disturbed the public good order or the public peace (article 338(dd) of Chapter 9).

h) And furthermore with having on the same date, time, place and circumstances disobeyed the lawful orders of any authority or of any person entrusted with a public service or hindered or obstructed such person in the exercise of his duties or unduly interferes with the exercise of such duties (Article 338 (ee) of Chapter 9);

i) And also with having on the same date, time, place and circumstances without inflicting any wound or blow, threatened others with stones or other hard substances, or threw the same, or taken up any other weapon against any person (article 339(b) of Chapter 9);

j) And also with having on the same date, time, place and circumstances attempted to use force against any person with intent to insult, annoy or hurt such person or others (article 339(d));

k) And also with having on the same date, time, place and circumstances threatened any other person with stones or with any other object or thrown any stone or other object on to the field of play or any other part of the sports ground or conducted himself in a manner likely to cause a breach of the peace (Regulation 6 of Legal Notice 88 of 1978);

l) And finally with having on the same date, time, place and circumstances while entering, were within or leaving the National Football Stadium at Ta' Qali used insulting words or showed abusive behaviour. (Regulation Number 7 Legal Notice 88 of 1978)

2. Having seen all the acts in the file including the Not Guilty plea filed by the defendant on the 8th September 2005, the medical certificates filed by Superintendent Pio Pisani, PC 622 Emanuel Cutajar and Police Inspector Jeffrey Cilia, the decree by which the Court nominated Dr. Kris Busietta as translator from the Maltese Language to the English Language and vice versa (16th September 2005), the decree of the Court confirming the experts who had been appointed in the inquiry, the report presented on oath by Architect Valerio Schembri who had been appointed expert during the Inquiry ordered by Magistrate Dr. Consuelo Scerri Herrera, the photographs taken by PS 612 Theo Vella, the DVD presented by PS 516 Alfio Borg, the photographs presented by the defendant, the English version of the testimony of PC 622 Manuel Cutajar, the decree of the Criminal Court dated 4th October 2005, the Proces Verbal drawn up Magistrate Dr. Consuelo Scerri Herrera entitled 'An Inquiry about the voluntary damage made at Ta' Qali National Stadium during the game Malta versus Croatia on the 7th September 2005', the DVD showing the end of match incidents taken by the defendant himself and shown in the Court Hall during the sitting of the 14th October 2005, the note filed by the Attorney General on the 4th October, 2005 in which the Attorney General decided to send the accused for trial by the said Court if the accused so consents, the consent by the defendant to have this the case heard by this Court which consent he did not withdraw after he was given some time to reflect on his decision, and the articles cited by the Attorney General which are as follows:

- (a) articles 214 and 216 of the Criminal Code;
- (b) article 237(c) of the Criminal Code
- (c) article 68(2)(3) of the Criminal Code
- (d) article 95 of the Criminal Code
- (e) article 96 of the Criminal Code
- (f) article 325 of the Criminal Code;
- (g) article 338(dd) of the Criminal Code
- (h) article 338(ee) of the Criminal Code
- (i) article 339 (1)(b) of the Criminal Code;

- (j) article 339(1)(d) of the Criminal Code;
- (k) regulation 6 of the Public Order at Sports Ground Regulations (LN 88/1978)
- (l) regulation 7 of the Maintenance of Public Order at Sports Grounds Regulations (LN 88/1978)
- (m) article 533 of the Criminal Code

3. Having heard the witnesses testifying on oath

4. Having heard the submissions made by the Prosecutor and the Defence

Has considered

As to the Facts

Witnesses for the Prosecution

5. The facts of the case are as follows. On the 7th September, 2005 immediately after the final whistle of the game Malta versus Croatia, about twenty Croatian supporters who were seated at the Valletta side approached the VIP area and started kicking and insulting the persons who were seated there. Superintendent Pio Pisani was hit and had three sutures applied to the LCW forehead (page 79). In the meantime the crowd became more numerous and more unruly as they started breaking the chairs in the VIP area. Sixteen policemen suffered injuries as missiles were hurled by the Croatian supporters some of whom also used a huge pipe to break down the door between the VIP stand and the tiers where the Croatian supporters were on the rampage.

6. Superintendent Pio Pisani testified that he had recognised the defendant as one of the supporters who had thrown chairs at the Maltese. He could not remember what clothes the defendant was wearing but he remembered the defendant's face. (pages 68 and 69). The Superintendent also testified that the defendant was in the lower part of the terraces. When pressed by the defendant's lawyer the Superintendent testified that he was quite sure of what he was saying, otherwise he would

not even have said it (page 70). The same witness said that he did not identify all the accused persons, who totalled 103. He could not recall whether the defendant was carrying any video camera but he could remember the defendant throwing chairs at them (the policemen and the Maltese supporters). The Superintendent did not speak to the defendant after he had identified him and he was not in a position to state whether the defendant had any bruises. The mayhem went on for about fifty five minutes. The Superintendent did not hear the defendant insulting the police and as the Superintendent was giving out orders all the time he replied in the affirmative when the defence lawyer asked him whether he had seen the defendant disobeying the police (page 75). The same witness said that he did not see the defendant threatening anybody.

7. PC 622 Manuel Cutajar took the witness stand and said that he had recognised the defendant because he was standing right in front of him about five metres away from him. He saw the defendant throwing cushions and seats and he was jumping high and throwing these objects (page 82). The witness was hurt and had to go to the Floriana polyclinic. He denied having been directly hit by the defendant but there were others. He could not remember what clothes the defendant was wearing but he remembered that there were a few supporters donning the Croatian colours. The witness could only remember the face of the defendant. The witness was adamant that they had not made rough guesses (page 85) in choosing whom to arrest. Some of the supporters had run to the toilets and the defendant was one of them. The witness had not seen any bruises on the defendant but he had seen him taking the chairs apart and throwing them while the defendant was in the lower part of the terraces. Finally, as the witness is not conversant with the Croatian language he could not say whether the defendant had threatened him.

8. Architect Valerio Schembri testified that according to an estimation he had carried out some 710 seats had been removed and the total cost of the damages amounted to

Lm8,636 Maltese Liri. PS 516 Alfio Borg presented a DVD of the incident divided into titles with the first title having six chapters and the second one having two chapters with a total running time of 38 minutes 16 seconds.

9. PS 612 Theo Vella, who had been appointed Scene of the Crime officer during the inquiry referred to above, confirmed his report on oath and filed 13 photographs of the area where the damage had been done.

The defence

10. The defendant testified on oath and presented some photographs and also a DVD that he had taken at the Stadium on the 7th September 2005. The defendant said that he had not come to Malta with a group of people. He was only accompanied by a friend and they came here to enjoy the game and that was all. He denied throwing anything at the Police and he said that it was impossible for him to do so as for most of the time he was filming the match and the incidents and at some moments he was also carrying his digital camera with him. Furthermore he stated that he remained in his seat above the railing throughout the whole episode. When the rampage died down, the policemen escorted the Croatian female football team while the rest of the supporters were encircled. The accused sat in the first row as there was no other place where to sit and he was asked to lift his shirt – an order which he obeyed. Then he was picked by an officer who was not the one who was not one of the two officers who testified in Court. During the cross-examination, the accused insisted that the officers who wrongly identified him.

11. The DVD registered by the defendant was shown during the Court proceedings. The filming, made by the defendant, was made at a considerable angle of depression taking the level of the football pitch as the point of eye contact from the upper tiers immediately above the toilets. At least, during the minutes of footage shown, there was no sign of the defendant in the vicinity

of where the trouble was brewing. In particular, the defendant does not appear during the incident specifically referred to by Superintendent Pio Pisani – the attempt to ram the gate separating the VIP area from the Croatian end - and this part of the violent incidents was filmed at length. On the other hand, the defendant was definitely in the toilet area or above it for two reasons (1) While the DVD was being shown he himself pointed out that the (alleged) drops of the blood on the floor were those he had filmed in the toilet or which were registered when the camera may have been inadvertently left on; and (2) The angle of the shots of the DVD shot by the accused corresponds more or less with the position the accused indicated.

Final Submissions

12. The Prosecution submitted that two witnesses had identified the defendant as one of the persons throwing chairs. On the other hand, the defence argued that identification may not always be the most reliable evidence, that the accused could have chosen an easier way out and that his testimony shows that he was not involved in the incidents.

As to the Law

13. The defendant is charged with a number of crimes and contraventions and the Court is going to examine the most important one first because the reflections on its elements and on the facts as above established will have a bearing on the outcome of this case.

14. The defendant is charged with a violation of article 237 (c) of Chapter 9 of the laws of Malta. The article reads as follows:

'237. Where in an accidental affray a homicide or bodily harm is committed and it is known who is the author thereof, each person who shall have taken an

active part against the deceased or the person injured shall, on conviction, be liable

.....

(c) in the case of a grievous bodily harm producing the effects mentioned in article 218, to imprisonment for a term not exceeding three months.'

15. Now the elements of this crime are basically (a) the existence of an accidental affray; and (b) a person taking an active part in it; (c) lack of knowledge as to who was actually responsible for the grievous bodily harm which leads to a permanent debility of the health or any permanent functional debility of the body, or any permanent defect in any part of the physical structure of the body, or any permanent mental infirmity (d) the mens rea to commit crime.

The first element

16. The facts reveal that the accidental affray took place and it lasted for about fifty five minutes, at least, according to the estimate given by Superintendent Pio Pisani. Section 237 of the Criminal Code does not define 'accidental affray' but the Court finds that there is enough evidence to show that more than two persons were involved. As Antolisei says:

'Per l'esistenza della rissa, non basta un semplice alterco fra piu' persone: occorre che vi siano una mischia violenta con vie di fatto. Per quanto normalmente essa si concreti in una colluttazione, il corpo a corpo non e' indispensabile, potendosi la zuffa svolgere a distanza, mediante lancio di sassi, colpi di rivoltella. Ecc. Non si esige un effettivo turbamento dell'ordine pubblico.'

Si discute sul numero minimo di persone indispensabili per l'esistenza di questo delitto, il quale senza alcun dubbio appartiene alla larga categoria dei reati plurisoggettivi. Alcuni autori

ritengono che siano sufficienti due persone e in questo senso si e' pronunciata varie volte la Cassazione. A nostro avviso, pero', e' preferibile l'opinione di quegli scittori che considerano la partecipazione di almeno tre persone.'¹

17. Even if one takes the higher number supported by this author, there is no doubt that there was an accidental affray on the 7th November 2005 at the Ta' Qali National Stadium.

The second element

18. The Prosecution is basing its case on two witnesses who identified the accused and were quite sure of his identity. They did not present any photos or films of the incident to corroborate their testimony. In fact, the defence asked the Executive Police to file a copy of the film that the Executive Police itself had made when the match was over. On the other hand, the defendant showed that for a considerable time he was standing in the upper tiers and not in the lower ones, that he has holding a video camera in his hand and at times he was taking photographs with his digital camera and the video he exhibited does not show him taking part in the affray or standing at ground level.

19. The Court has no doubt that the witnesses for the Prosecution were convinced that they had identified the defendant. However, in deciding this case, this Court is going to follow the guidelines set out in the case 'R vs Turnbull and others' [1977] Q.B. 224 at 228-231, 63 Cr.App.R at 137-140 and in the case 'The Executive Police versus Silvio Zammit decided on the 15th July 1998. In R versus Turnbull it was held that :

'The judge should direct the jury to examine closely the circumstances in which he identification by each witness came to be made. How long did the witness have the accused under observation? At what

¹ Antolise F. Manuale di Diritto Speciale Parte Speciale – 1 pagina 107.

distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused?

Omissis

In our judgement when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it.

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation was very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.'

20. On the other hand, in the case 'The Executive Police versus Stephen Zammit' the Court of Criminal Appeal held²

'The First Court had to consider all the circumstances which could raise doubts about the reliability of the witnesses, including the way the photos were shown and the procedure used during the identification parade.'

21. The case referred to involved an identification parade and the testimony of two witnesses who had identified the accused without any shadow of doubt.

² 16th July 1998 Criminal Appeal Vol LXXXII.IV page 242

Application of the doctrine of 'R versus Turnbull' and 'The Executive Police versus Stephen Zammit'

22. In the present case, the witnesses are two policemen, one of whom holds the rank of Superintendent, both of whom have been trained to observe people and who have been in the Police Force for many years. So this is a question of direct identification or recognition by the police during the affray.

23. The Court, however, notes that while the officers could remember the face of the defendant, they could not recall what clothes or tee shirt he was wearing. Moreover, with so many persons milling around the gate meant to separate the Croatian supporters from the VIP section, the police were in a difficult situation as they were heavily outnumbered and had to deal with a situation they had not envisaged before. In fact, as Superintendent Pio Pisani testified, there were no incidents during the match and hence the Police force was not psychologically prepared for the fracas which erupted. Besides this, the numbers were overwhelming and the Police were not identifying/recognising a Maltese citizen, whom they might have known locally, but somebody whom they had come across at the end of the match when confusion reigned supreme. Furthermore, the way the accused was rounded up when the Executive Police finally brought the situation under control raises doubts about whether the accused was identified particularly as the person pointing him out was not one of the officers who took the witness stand.

24. Of course, this Court is not holding that the identification of a person should always be discarded. No textbook on Evidence says this and a person may be convicted on the identification by another person if the Court is convinced that the identification is a reliable one. This is even more so when the identification is corroborated by other evidence.

25. In this case, the DVD shot by the Executive Police lasted 37 minutes and during these thirty seven minutes

the accused does not appear at all. This means that there are about 18 minutes unaccounted for if one assumes that the **whole** DVD shot by the accused himself overlaps the time frame of the DVD shot by the Police. Now the DVD the accused showed in the Court Room reveals that it was not shot at ground level or from the lower tiers but from a substantial height. Moreover, it shows an incident which is not recorded in the DVD of the Executive Police. The Court is here referring to the efforts made by Croatian supporters to break down a gate by using a pole. If this part of the filming is added to the 37 minutes shot by the Police, then the 18 minutes referred to in this paragraph are reduced further. Admittedly, the accused could have asked his friend or somebody else to look after his camera, rushed down the stairs and started throwing the seats for the few minutes which remain unaccounted for.

26. The Court has considered also the possibility of the accused having done so because of the strong testimony of the witnesses for the Prosecution to whom it gives due credit and who were testifying to the best of their knowledge. **However, because of the reasons set out in paragraphs 11, 23 and 25 of this judgement, there remains a lurking doubt in the Court's mind which precludes it from establishing beyond reasonable doubt that the accused took an active part in the mayhem.**

The Third Element

27. The Court could have stopped examining the elements of this crime after coming to the above conclusion. However, the Court has also noted that the 12 medical certificates between pages 79 and 101 show the following statistics: Slight injuries 7 certificates; slight save complications: 4; serious (permanent) 1.

28. Subsection (c) of section 237 refers to the grievous bodily harm envisaged by section 218. The above statistics show that at least 7 cases fall clearly outside the perimeters of section 218 while the other 5 have not been sufficiently supported by sworn testimony.

29. In the Court's view, this means that the third element of this crime has not been sufficiently proved by the Prosecution.

30. At this stage it is no longer necessary to examine the fourth element and hence the Court is declaring that the Court does not find the accused guilty of breaching section 273(c) of the Criminal Code.

The Other Charges

31. (a) Articles 214 and 216. These articles deal with the definition of bodily harm and grievous bodily harm respectively. As the accused has not been *individually* identified as having caused any bodily harm the Court is declaring that the accused is not guilty of this charge.

32. (c) Article 68(2)(3). This article deals with the active participation of a person in an assembly of ten or more persons for the purpose of committing an offence. In view of the fact that the Court has expressed doubts about the presence of the accused in the thick of fray, it is declaring that it does not find him guilty of violating this article.

33. (d) Article 95. This article deals with vilifications, threats or bodily harm against a person lawfully charged with a public duty while in the act of discharging his duty. The Court finds no evidence that the accused has done any of the crimes referred to in this article and hence it declares that it does not find him guilty of violating this article.

34. (e) Article 96. This article deals assault or resistance by violence or active force not amounting to public violence. In view of the Court's conclusion in paragraph 26 above, the Court does not find the accused guilty of this charge.

35. (f) Article 325. This article deals with voluntary damage to property. As there is no evidence that the

accused has done any damage, the Court is declaring that the accused is not guilty of this charge.

36. (g) (h)(i) (j) The charges under these articles are contraventions and are alternative charges to the charges already referred to above. The Court does not find the accused guilty of any of these charges for the reason already stated.

37.(k)(l). The charges here refer to special regulations under the Sports Act. Regulations 6 and 7 deal with breaches of the peace and insulting words respectively. Once again these are alternative charges to the charges mentioned in paragraphs 31 to 35 inclusively. The Court is declaring that the accused is not guilty of these charges for the reason already stated.

38.(m) Article 533 is inapplicable as the Court has not found the accused guilty and all the experts were appointed during the inquiry and not during the Court proceedings.

Conclusion

39. For the reasons given above, the Court, after reading articles 214, 216, 237(c), 68(2)(3), 95, 96, 325, 338(dd), 338 (ee), 339(1)(b), 339(1)(d) of Chapter 9 and regulations 6 and 7 of the Maintenance of Public Order At Sports Grounds Regulations (LN 88/1978) declares that it does not find the accused guilty of any of the charges made against him.

< Final Judgement >

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