



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

**MAGISTRATE DR.
JACQUELINE PADOVANI**

Sitting of the 3rd May, 2007

Number. 662/2006

**POLICE
INSPECTOR MARTIN SAMMUT
VS
VIKTORS BARILAKS**

The Court,

Having seen the charges brought against the accused Viktors Barilaks, 43 years, son of Nikolai and Valentina, born on 23rd September 1964, Latvia, residing at Martin Court, Flat 16, Triq I-Universita', Msida, holder of passport number N.R. 1504797 issued Latvia, and charge him with having in these Islands, on the 8th July 2006, at about 23.15hrs, in St George's Park, situated in Dragonara Road, St Julians, and in the vicinity:

1. by lewd acts defiled a minor, *omissis*, in breach of Article 203(1) of Chapter 9 of the Laws of Malta;

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2. by any means, instigated, encouraged or facilitated the defilement of minor *omissis*, in breach of Article 203(A) of Chapter 9 of the Laws of Malta;

3. committed violent indecent assault on the person of a minor *omissis*, in breach of Article 207 of Chapter 9 of the Laws of Malta;

4. committed an offence against decency or morals, by any act, committed in a public place or in a place exposed to the public, in breach of Article 209 of Chapter 9 of the Laws of Malta;

5. attempted to use force against *omissis*, with intent to insult, annoy or hurt her, in breach of Article 339(1)(d) of Chapter 9 of the Laws of Malta.

Having heard the evidence tendered on oath;

Having seen the record of the proceedings;

Having seen the consent of the Attorney General, document X at page 6, and the consent of the accused at page 3, for the procedure to be dealt with summarily;

Having heard the oral submissions of the parties;

Considers:-

From the evidence of *omissis*, who recognized the defendant in the Court room, it resulted that the previous Saturday between eleven and twelve at night, she was walking towards her hotel and a man touched her private parts by goosing her. In her evidence, at page 10, she states the following:

'I think that the man who touched me was the defendant, but I do not know. Now I say that I am sure, I said that I was not sure because I was feeling scared and then I told him something to the effect that he was stupid. I was angry and very sad, and he said I can do whatever I want, I can fuck you if I want to. I started to cry and ran away. I went to my hotel room crying.' (vide page 10).

Thereafter, she met her group leader, related what happened to her, and asked her to identify the man who did such actions. *Omissis* stated that the accused was still in the hotel area, and that she identified him to her leader. Thereafter, she was questioned by the Police at the Police station, where she did not identify the accused that evening, but she identified him at the Police station the day after in broad daylight.

Omissis stated, at page 11, that the accused had been withstanding with some friends and they were all laughing together, previous to the incident. *Omissis* stated that she could see that they had all been drinking, and also stated that the molestation lasted between five to ten seconds, and that the accused had spoken in the English language; that he was wearing a light coloured t-shirt with stamps on it.

Omissis stated, at page 11, that the area of the hotel where the incident happened:

'was dark, and as I said it was night time. However where the defendant was, there was light and therefore I could easily identify him.'

In cross-examination, *omissis* stated:

'I saw the defendant coming up to me, he came from the back. I saw the defendant because I happened to look back, defendant touched me as I said and I am certain that defendant spoke to me in English. I am certain that if was the defendant and not one of his friends who did what he did to me. When I said that I was scared when I saw defendant when I showed him to the group leader I don't know, I don't want to be here, I don't want to be in this country, I want to go home.'

Dr Joseph Fenech, at page 27 et seq, confirmed that the accused was working on the Mater Dei project at the time of the alleged incident.

Inspector Martin Sammut, at page 36 et seq, testified that at the night between the 8th and 9th July 2006, he was informed by PS 1492 Joseph Pace that a report had just been filed by *omissis*, *omissis* years of age, that she had been sexually assaulted by a foreigner on her way back to the hotel. Inspector Sammut stated that Sergeant Pace had gone to the indicated hotel where he found *omissis* accompanied by two security officers of the hotel. Sergeant Pace stated that *omissis* indicated the accused as having been the man who had sexually assaulted her.

Inspector Martin Sammut stated that the accused was arrested and brought to the Police station for interrogation, but he was drunk and he fell asleep. In the meantime, Inspector Martin Sammut heard *omissis* explain how the incident had happened, and informed the Court that on a previous night, she had been harassed by five or six strangers, however the accused was not one of them. She stated that on the night in question, she was in the car park going back to the hotel, when a man crapped up behind her and touched her private parts, stating repeatedly that he wanted to f*** her. *Omissis* stated that her assaulter spoke to her in English. When this incident happened, *omissis* ran to the hotel, she found her group leader and was thereafter accompanied outside by security officers of the hotel. It was then that she indicated the accused who was in the company of another male friend.

Inspector Martin Sammut stated that the following morning, he interrogated the accused, who did not speak a word of English, and therefore, the interrogation took place with a help of a Russian interpreter Ludimila Pluschina. Inspector Sammut stated that after Barilaks was cautioned, he stated in his signed statement that he was present where the incident happened, but he denied that he had followed the young girl, he denied touching her or speaking to her in such a manner. He stated that he had drunk some alcohol, that is, four pints of beer and some Vodka with a group of Russians that he had met near the hotel, he stated that at one moment he saw commotion between the young girl and other persons, he

was curious to see what had happened, and therefore approached the entrance of the hotel. It was at this time that the security officers, accompanied by this young lady, came out and pointed at him.

The accused, in his statement, stated that that the time of the incident, he was simply sitting on the bench, he heard the screaming of the girl coming from the direction behind him, he was curious to see what happened, so he stood up and walked to the hotel. Some time later, the security of the hotel or members of the Police, came up to him. The accused stated that when he was sitting on the bench, he was with a group of other Russian people. In his statement, the accused said that he could not tell whether the girl who was screaming, was on her own, because the screams came from behind him, but that he had noticed that two other girls were walking in front of this girl. He stated that he never saw anyone running from behind him. The accused, in his statement, said that when the girl picked him out, he was on his own.

Inspector Sammut stated that the accused was wearing a light-coloured T-shirt on the night of the incident. Indeed, in document MS, the signed statement of the accused, at page 42, the accused categorically denies this incident, stating that he was sitting on a bench near the hotel, when he heard the screaming of a girl who was running behind him towards the hotel. He stood up because he was curious and walked to the hotel to see what was going on. Some time later, the security of the hotel and the Police picked him up. He categorically denies the incident stating that he never touched the girl, he had never seen her before, and he certainly did not speak to her in English.

PS 1492 Joseph Pace, at page 43 et seq, stated that at 23.15hrs on the 8th June 2006, he received a phone call for assistance at St George's Park, he went there and found a girl who was claiming that she had been sexually assaulted by a man, and was in a state of shock. PS 1492 Pace stated that he had spoken to the girl, and that she indicated a person in that area. PS Pace stated that he approached the accused, who became aggressive and

had him hand cuffed. Then they confronted the girl, who confirmed it was the person who had assaulted her. The accused was then arrested and sent to St Julians Police Station, and Inspector Martin Sammut was informed of the incident.

The Police report was marked and exhibited as document PS.

PS Pace stated on oath that the accused was on his own when he was arrested, however the security persons had indicated that there was somebody else with him, but that the girl had confirmed that the accused was the only person involved. PS 1492 said that he spoke in English to the accused, but that he could not know whether he had understood him or not. PS Pace stated that the accused showed him his wallet after he had asked for his passport. PS Pace stated that the girl had indicated the person right away, that he had asked her twice, and that she had recognized the person the day after at the Police station. Asked whether she had given a description of him, PS 1492 stated that she had said he was tall with short hair (vide page 45).

PC 776 Victor Gafa', confirmed the statement released by the accused (vide page 57 and 58).

PC 451 Aaron Bugeja, at page 59, stated that he was detailed to work at Paceville on the night of the 8th till the 9th July 2006, when he received a phone call from the St Julians Police Station, regarding a sexual assault on a foreigner near St George's Park. PC 451 stated that they were told:

'that some securities from the St George's Park were holding a foreigner that was involved in some kind of sexual offence. When I went there, we found Viktors over here (pointing to the accused).'

PC 451 stated on oath that he put the accused under arrest, he thought that the accused was drunk, and stated that the Police took *omissis* to the Police Station, before

they took the accused Viktors Barilaks to the station. In cross-examination, PC 451 stated that he tried to speak to the accused in English, but he did not understand too well, and he kept repeating the words '**me no problem**'.

The accused Viktors Barilaks took the witness stand and stated that after work, he started walking in the direction of Paceville. He stated that throughout the day he had drunk about four cans of beer whilst he had been on the beach, and that he had arrived in Paceville at around seven o'clock. He found the hotel and a bench nearby, and start up a conversation with some Russian speaking people. The accused said that he spent about half an hour or forty minutes talking with these Russian speaking people, some of whom were women. From the back he heard someone screaming and shouting, he turned his face, he saw this girl, she was behind him, exactly behind him, who ran away to the hotel and disappeared. At this point in time, everybody else left.

After that, he went towards the direction of the hotel, simply because he was curious to know what had happened to the girl. When he approached the entrance of the hotel, this girl went out to the security officers. The accused understood the word 'problem' and he answered them with the words '**no problem**', but they put him down on the floor, and put a light in his face. Then afterwards, they took him to the Police station. The accused stated that he was taken to the Police station, where they kept asking some questions which he just did not understand, and subsequently, he fell asleep. It was only the next day when the Inspector spoke to him with the aid of an Interpreter that he realized what the incident was about.

At page 66, the accused stated that on the day of the incident, he was wearing a blue shorts, sandals and a sleeveless vest which had a dragon on it, the colour of sand, that is, clay. In cross-examination, at page 68, the accused states that he was alone when he was walking in the direction of the hotel, but there were other people in the area since it was a hotel and people were walking in and out, but he was unaccompanied. The accused stated

that the area was not well lit at all, but that the entrance of the hotel was very well lit.

Ruslan Karpov, at page 69, confirmed that the accused works under Mater Dei Hospital project, and that he was in his employment for a period of one and a half years. He confirmed that the accused was Russian speaking and he did not speak any English at all (vide page 69). Ruslan confirmed that when he received the phone call from the St Julians Police Station and went to see the accused, he found that the accused was totally unaware of what the charges were. He stated that on that day, the accused was wearing a vest with a dragon on it, and this dragon was a shade between green and brown. He also stated that all the time that he knew the accused, he had never heard anything negative being said about him.

Considers:

The issues in this case revolve quite crucially on the question of identification. After examining in detail the testimony of *omissis*, at page 10 to 12, this Court cannot say that the Prosecution has proven beyond reasonable doubt that the man who assaulted the same *omissis* is in fact the accused. This is being stated in view of the fact that although *omissis* states in her opening words that she recognizes the defendant, immediately after this, at page 10, the seventh and the eighth line, she retracts all this stating that she is not sure about the identification of the accused. Immediately after, she states that she is sure and that the reason for her saying otherwise was the fact that she was scared of the accused.

However at the end of her testimony, at page 12, she again retracts all this stating that, **'I don't know, I don't want to be here, I don't want to be in this country'**.

Apart from all this, there is the conflicting evidence of PC 451 and PS 1492 which poses this Court rather grave concern on the matter of identification. PC 1492 states that it was the girl who indicated the accused, PC 451 however states that when they arrived on the scene, they

found **the accused being held by the security personnel of the St George's Park**. Furthermore, PC 451 states that *omissis* was taken to the Police station **before** the accused was escorted, whereas PC 1492 simply states that the accused was taken to the Police station and that *omissis* actually pointed him out.

This Court believes that the identification procedure was not handled well by the Police, and that in her panic, *omissis* could have been influenced indirectly to pin point the accused having seen him in the hands of the security guards. This Court, furthermore, finds that the Prosecution **failed to interrogate the group leader**, who should have been brought in evidence before this Court, and certainly **failed to produce in evidence, the security officers** of the relevant hotel, who could have shed some light on the matter. Moreover, in spite of the fact that PS 1492 testified that the security officers had indicated that **the accused was in the company of another man**, PC 1492 failed to identify who this other man was, who indeed could have been a pertinent witness.

In addition, the accused was very forthright in his statement and in his evidence before this Court. Apart from his categorical denial of the whole incident, it would make absolutely no sense for the accused (had he been the person who assaulted the girl), to go to the hotel to find out what happened. Indeed, this action in itself, shows that the accused had no reason to flee from the 'scene of crime', (as the other did), and in fact was rather concerned about the welfare of the girl.

On the matter of identification, the English Devlin Committee recommended:

'That the trial judge should in every case give a very strong direction to the jury that evidence of identification alone is not sufficient to satisfy the high burden of proof in criminal cases, and explain to them exactly why this is so. It recommended further that the jury be directed that only in a limited range of exceptional circumstances would a conviction depending upon identification evidence be

justified. Like the Criminal Law Revision Committee, the Devlin Committee took the view that in the then state of the law it was necessary for any such change to be introduced by statute. (vide Cross and Tapper on Evidence 8th Edition at page 789).

*This view was, however, overtaken by the highly influential decision of the Court of Appeal in R v Turnbull (1). Since the Court of Appeal took the view that the direction of juries was a matter of practice, it felt competent to prescribe the proper action. It took its cue from the recommendations of the Devlin Committee, and in particular stressed the need for some explanation of the need for special caution in accepting evidence of identification. It went on to require the judge to direct the jury in some detail about **the quality of the evidence of identification.**'*

(1) {1977 QB 224, [1976]3 All ER 549, endorsed by the Privy Council in Reid vs R (1990) 1 AC 363, [1993] 4 All ER 95n.}

It is precisely the quantity of the evidence of the identification of the accused in this case that falls short of the standard required in Criminal Law, that is, beyond reasonable doubt, and it would be unsound in the light of the wavering identification made by the victim together with the conflicting evidence of PS 1492 and PC 451, and the absence of evidence of group leader and security guards, for this Court to put any probatory value on the evidence of *omissis*.

In the light of all this, this Court is of the opinion that the Prosecution has failed to prove its case beyond reasonable doubt, and therefore, finds the accused not guilty as charged and acquits him of the same.

< Final Judgement >

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