



MALTA

**COURT OF CRIMINAL APPEAL**

**THE HON. MR. JUSTICE**

**MICHAEL MALLIA**

Sitting of the 29 th January, 2015

Criminal Appeal Number. 388/2014

Appeal Nr: 388/2014

The Police

[Inspector Joseph Busuttil]

Vs

Johnson Anène

Today the, 29th January, 2015,

The Court,

Having seen the charges brought against Jonson Anène, holder of Maltese Identity Card No. 41571A, before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having:

On the 19th April, 2014, at about 23:45hrs as the person responsible for the establishment styled as Different Colours, situated in Gifen Street, St. Paul's Bay:

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- 1) Played or permitted to be played amplified music without the necessary permits from the competent authority;
- 2) Also accused of being in possession of a license failed to comply with any applicable provision of this act or with any condition, restriction or other limitation to which the license is subject.

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 29th September, 2014 whereby the Court, after having seen articles 38(2)(a) of S.L. 441.07 and section 43(1)(b) of Chapter 409 found the accused guilty of the charges laid against him and condemned him to the payment of a multa of one thousand three hundred euro (€1300).

Having seen the appeal application presented by Johnson Anène in the registry of this Court on the 9th October, 2014 whereby this Court was requested to cancel, revoke and annul the appealed judgement and instead after hearing all proof, freeing the appellant of all accusations brogthut forth against him or/and handing down any other provision which this Honorable Court deems suitable and opportune.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appellant, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal:

### First Aggrievance

The appellant felt aggrieved by the fact that the Court chose to believe the version as provided in the affidavit handed out by PS914 Ivan Mifsud which version is in stark contrast to the one provided by the appellant under oath. In the Criminal field the burden of the prosecution is to prove their accusations beyond reasonable doubt. With regards to the defence, enhanced by the presumption of innocence, can base or prove her case even on a balance of probabilities meaning that one has to take into consideration the probability of that version accounted by the accused as corroborated by any circumstances.

This means that the prosecution has the duty to prove the tort attributable to the accused beyond every reasonable doubt and in the case that the prosecution being considered as not proving the element of tort the Court has a duty to liberate the accused.

In his affidavit PS914 provided that several phone calls were received at Qawra Police station at 20:00hrs that loud music was being played at a newly opened bar, namely Different Colours in Triq il-Gifen, St. Paul's Bay, however despite several

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phone calls being recieved the police did not even summon a single witness to confirm the nature of the crime.

Furthermore upon entering the premises as stipulated by the same police in his affidavit, at no point did he state that there were people present within the premises. Hence it would be senseless to have a bar with no clientele within the premises and with music being played at a very loud volume. In such case and in such circumstances the presiding judge or magistrate ought to apply good sense in that such adjudicator ought to be morally convinced of such facts as attempted to be reached and proved by the prosecution.

In the case at point the only witness who took oath was the accused who witnessed upon what had actually occurred. Notwithstanding Article 638(2) of the Criminal Code, the Court chose to believe the version as provided in the affidavit by PS914, although the accused was consistent and regular in narrating about the version of events as actually occurred on the 19th April, 2014, apart from his consistency in answering all questions as set forth by the prosecution.

Whereby article 637(2) of the Criminal Code provides for the credibility of the witness which has to be left in the discretion of those judging facts by taking into consideration the character and conduct of the witness. In the case at point the appellant was always very consistent with regards to the facts of the case.

### Second Aggrievance

Whereby with regards to the fine imposed by the First Court upon the accused amounting to €1300, such fine is in excess to the amounts provided by law and is far too harsh and unproportionate to the parameters established by law especially taking into consideration that it was the first time that the accused opened his business and consequentially was faced with such accusations as set forth in the citation. In such respect the accused not only feels aggrieved but also discriminated in that he is unable to earn a decent living.

Article 18(1)(a) of Chapter 441 concerns penalties which provide that:

- (1) *Where any person contravenes any of the provisions of this Act or of any regulations made thereunder, he shall be guilty of an offence under this Act and shall on conviction be liable, unless any other penalty is prescribed under any other provision of this Act;*
  - (a) *On a first conviction, to a fine (ammenda) of not less than one hundred and sixteen euro and forty-seven cents (116.47) but not exceeding one thousand and one hundred and sixty-four euro and sixty-nine cents (1,164.69);*

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In the numerous cases and judgement handed out it is very rare that a person gets convicted upon a first conviction to a fine of €1300. Such fine imposed upon the appellant not only supersedes the parameters of the law but is also exaggerated especially taking also into consideration that it was the first time that the appellant had opened his bar, and this apart from the fact that he strongly opposes the fact that he played amplified music after 23:00hrs.

Save any other further grievances which can be set up in a Court of Law.

Considers:

That appellant and his wife Maria Anene are the registered operators of a newly opened bar by the name of *Different Colours* in Triq il-Gifen, Qawra. On the 19th April 2014 PS 914 Ivan Mifsud went to the bar at around eight o'clock in the evening (8.00 p.m.) where he heard very loud music and spoke to the accused informing him that he had to stop playing amplified music at eleven o'clock at night since he had no licence to play that sort of music after that time. PS Mifsud went again at 23:45 hours and as he was passing by heard loud music being played. He went into the bar and ordered the accused to turn off the music. PL Quentin Tanti on behalf of the Malta Tourism Authority explained that the appellant was the registered operator, together with Mrs Maria Anene, of the bar in question. The bar is covered by a permit to play amplified music up to 23:00 hours. After that time no amplified music may be played.

Appellant Johnson Anene stated that on the day in question the police knocked at his door because there was no one inside. He had opened the bar at 6.30 p.m. as with the other bar in the vicinity but his bar was closed when police came and no music was playing.

Appellant was therefore brought before the Magistrates' Court to answer two charges, one concerning the playing of amplified music and the second was breaching of licence. The first Court found accused guilty after believing the version given by PS 914 Ivan Mifsud and condemned him to a fine (multa) of one thousand three hundred euro (€1,300).

Appellant felt aggrieved by this judgement and filed an appeal claiming that two versions were brought by the prosecution and this should have caused a conflict of

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evidence resulting in the acquittal of the accused. In any case the fine was excessive and above that prescribed by law.

Considers:

That this Court has numerous times made it clear that not every conflict of evidence should automatically result in the acquittal of the person concerned but the Court must, in case of conflict, as there usually is under such circumstances, evaluate the evidence produced according to the criteria mentioned in article 637 of Chapter 9 and come to the conclusion who is to be believed and in what and who is not to be believed (Police versus Joseph Thorn, Criminal Appeal, 9th July 2003). In this case the first Court, did just that and came to the conclusion that the evidence produced by PS 914 Ivan Mifsud by means of affidavit is more credible than that produced by the appellant. The Court is satisfied that the appellant was playing loud music. He was warned beforehand that that level of music should stop by 11.00 p.m. Evidently he did not take this warning seriously as three quarters of an hour past eleven Sergeant Mifsud was again passing by the bar and he could attest to the loud music being played therein.

So as far as the merits of the case is concerned this Court finds no reason to disturb the discretion of the first Court. As regards the fine, this Court observes that appellant was charged on two counts, one for playing amplified music outside permitted hours and the second for going against his licence.

Article 18(1)(a) of Chapter 441 states that on first conviction the fine should not exceed €1,164.69 but section 43(1)(b) of Chapter 409 states that the fine should not be less than €1,164.69 and not more than €23,293.73 plus a prison term if breach persists for more than two months. The first Court imposed a fine of €1,300 which is therefore within the parameters of law. Under such circumstances the Court of Appeal will not disturb the discretion of the first Court once there is nothing to indicate that the fine should have been less than that prescribed (Republic of Malta versus David Vella, 14th June 1999). Under such circumstances, therefore, this Court finds no reason to disturb the discretion of the first Court and therefore dismisses the appeal, confirming the first judgement.

**< Final Judgement >**

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