

25th. April, 1949.

Judge :

The Hon. Mr. Justice W. Harding, B.Litt., LL.D.

The Police *versus* Alfred W. Luck et.

**Assault and Resistance, or Threat, to Public Officers —  
Active Force — Violence — Evidence of a Co-Defendant —  
Art. 94 and 95 (c), 353 (d), and 632  
of the Criminal Code.**

*The Maltese Law considers as incompetent to give evidence (except on his own behalf) anyone charged with the same offence in respect of which his deposition is required, unless the proceedings against him are put an end to. And this rule applies in an absolute way, without any distinction as to whether he is called as a witness for the Prosecution or for another defendant.*

*An assault is constituted by any attempt to apply unlawful force to another, or any threat which is accompanied by, or consists of,*

any act or gesture showing a present intent to use unlawful force, and is also accompanied by a present ability to carry the threat into execution.

The throwing of stones, if the person aimed at is missed, is an assault. The assault must be made by violence or active force; by "active force" being meant any hostile act calculated to hurt such person; so that mere threats or insulting words are not sufficient for the purpose of this crime.

If the act incriminated is only a threat consisting in an act at such a distance that the threat could in point of fact be carried out against persons lawfully charged with a public duty, and meant to intimidate them in the discharge of their duty, the act does not constitute an assault, but it constitutes the minor offence of threat to public officers.

There is nothing unlawful if a police officer uses that "modicum" of force that is necessary, by the acts of the aggressor, so that the fact that the aggressor, as a result of the use of that force used by the police officer, suffers some injury, would not appear to be material in his defence.

This is an appeal by the three defendants against a judgment given by the Criminal Court of Magistrates for the Island of Malta on the 24th. February, 1949, whereby the first two defendants Luck and Kemp were found guilty in terms of s. 95 (b) of the Criminal Code, of having, together with others, attacked with violence persons lawfully charged with a public duty whilst in the execution of the law, as well as under s. 339 (d) of the said Code, of having, together with others, caused damage to Government property to the amount of 8s. 6d., and were respectively sentenced, for the first offence, to the punishment of imprisonment for the term of seven months, and for the second offence to a fine (ammenda) of £1; and the third defendant, King, was found guilty under section 94 of the said Code, of having threatened persons lawfully charged with a public duty whilst on duty, and guilty, under section 339 (d) of the said Code, of having, together with others, wilfully caused damages to Government property to the amount of 8s. 6d. and was sentenced, for the first offence, to the punishment of detention for the term of 15 days, and for the second offence to the punishment of a fine (ammenda) of £1;

This Court, upon examining....., considers us follows;

It is almost stating the obvious to say that the case of each of the defendants must be examined separately, as otherwise, by taking the case cumulatively, there may be the risk of applying against, or in favour of one of them, evidence which would be properly so only against a particular defendant;

With regard to the first defendant, Luck, the state of the evidence, as it appears in the record, is the following;

Police Constable Saliba states that on the day in question..... The evidence of this witness, therefore, does not implicate the first defendant in the charge, brought forward against him. It only goes to establish, together with the other evidence, the general background of the whole incident, and the bare fact that this first defendant was taken into custody, following the incident in question, by other members of the Police Force;

The next to give evidence is Police Constable Portelli, who was in the company of the afore said Police Constable Saliba at the Gżira Police Station. He begins his evidence by saying..... Subsequently, this witness saw Luck in the station, and locked him up in the cell with the two other defendants, King and Kemp;

Sergeant Mifsud..... saw this first defendant..... This witness says that both witnesses Saliba and Portelli identified Luck as one of the ratings who had thrown stones and glass bottles inside the Police Station. He adds that Luck was not locked up in the cell;

Police Constable Attard states that he accompanied Sergeant Mifsud.....;

This first defendant elected to give evidence, and substantially this is his version:— On the night in question..... He denies having handled at any time any stone or bottle, or having thrown anything at the Police officers;

This is the state of the evidence, as far as this first defendant is concerned. In his evidence, the other defendant Kemp makes statements which coincide with those made by

Luck. But Kemp's evidence cannot be taken into consideration by way of evidence for the co-defendant Luck, but only as evidence for Kemp himself. Maltese Law, in fact, in section 632, Chap. 12, considers as incompetent to give evidence (except, of course, on his own behalf) anyone charged with the same offence in respect of which his deposition is required, unless the proceedings against him are put an end to. Maltese Law does not make any distinction as to whether the evidence of the co-defendant is required by the Prosecution or by another defendant. In a note marked letter (8) on page 448 of Harris and Wilshere's Criminal Law, 1933 Edition, it is stated that one of two persons jointly indicted is entitled to give evidence not merely on his own behalf, but for the defence generally. In Archbold's Criminal Pleadings, Evidence and Practice, 1943 Edition, p. 441, however, it is stated that a defendant may give evidence against a co-defendant for the Crown, if an end is put to the proceedings, either by a "nolle prosequi", or by a verdict of acquittal, or by a plea of guilty on arraignment, or where, though jointly indicted, he is not being tried with the defendant against whom he gives evidence; and it is further stated that "in all these cases" a defendant is also a competent witness for a co-defendant. This would appear to show that, also under English Law, both if the defendant is called for the Crown as well as if he is called for a co-defendant, it is in each case necessary that, first of all, the proceedings against such defendant as is called to give evidence is terminated. In any case, it should be emphasised that Maltese Law considers the co-defendant incompetent in an absolute way, without any distinction as to whether he is called as a witness for the Prosecution or for another defendant, until the proceedings are put an end to;

Now, weighing the evidence above referred to, with regard to Luck, it would appear to be correct to divide the incident into two stages.....;

This Court, therefore, finds, as a fact, that this defendant threw stones at Sergeant Mifsud and Police Constable Attard at a time when these two members of the Police Force

were rushing to aid their hard-pressed comrades in the Police Station, and at a time when the window panes of the station were being battered about by the throwing of stones and bottles;

Now the Court below, which included Luck as a participant also in the first stage, found him guilty of an offence under s. 95 (b) of the Criminal Code (attacking with violence persons charged with a public duty whilst in the execution of the law), and also of the offence of having caused damage to Government property. This Appellate Court, on the strength of the foregoing considerations, has come to the conclusion that the fact properly chargeable to defendant Luck is that he threw stones at the two members of the Police Force afore mentioned at a time when they were carrying out their duties;

The charge of the offence of having caused damage to Government property is, therefore, not tenable any longer. The point now is whether the fact, as found by this Appellate Court, constitutes an offence under section 95 (b) of the Criminal Code. that is, the other offence of which Luck was also found guilty by the First Court;

The section runs as follows:— "Whosoever shall assault or resist by violence or active force, not amounting to public violence, any person lawfully charged with a public duty, when in the execution of the law or of a lawful order issued by a competent authority, shall, on conviction, etc.";

Para. (b) of the section envisages an aggravating circumstance in that the offence is committed by three or more persons;

There is no doubt that at the time Mifsud and Attard were lawfully charged with a public duty and that they were acting in the execution of the law. There can equally be no doubt that the throwing of stones at the two officers constitutes an assault. An assault is constituted by any attempt to apply unlawful force to another, or any threat which is accompanied by, or consists of, any act or gesture showing a present intent to use unlawful force, and is also accompanied by a present ability to carry the threat into

execution. It is well known that if A throws a stone at B and hits him, it is a battery; if he misses him, it is an assault. In terms of law, it must be an assault by violence or active force. The expression "active force" must be understood as it is meant in section 353 (d), that is, any hostile act calculated to hurt another person. In fact, in the old Italian text of the law, in both sections 95 (b) and 353 (d), the same wording "vie di fatto" was used. It is true that the very word "assault" implies an act calculated to do harm; but, in the opinion of commentators, the requirement consisting in the words "violence" or active force" was laid down in order to make it clear that mere threats or insulting words were not sufficient. Nor would the picking up of a stone even though with the revengeful intent to use it, be sufficient, unless there be an act which constitutes the commencement of the aggression, such as the throwing of the stone, even though without hitting the person against whom it is so thrown. It has also been held by French Courts in interpreting a similarly worded provision of the French Criminal Code, that the expression "active force" and the word "violence" are to be considered as synonyms (vide *Annotazioni Leggi Criminali*, Dr. Falzon, page 172):

There does not appear to be any doubt that the action of Luck was intended to frustrate Mifsud and Attard in the execution of their duty, because, at the time, both officers were helping their comrades by scattering the sailors who were throwing stones and bottles inside the station. It is a clear case of "cum victoribus pugnare", which is the essence of this offence:

This Court, however, is not of opinion that para. (b) of the section fails to be applied. The Lower Court applied that section because it had held that Luck was also one of the ratings who threw stones and bottles inside the station. This Court, however, has not concurred in that conclusion, and has limited the act attributable to Luck as afore described. In that act — that is, throwing stones at Mifsud and Attard — it does not seem proper to hold that some other was participating along with Luck, and it would therefore

appear to be fair to bring the offence as being a lesser offence under para. (a) of that section;

Passing on to the case of the second defendant, Kemp, he was found guilty by the Court below of the offence of assault with violence of persons lawfully charged with a public duty whilst in the execution of the law, and also of the offence of having caused damage amounting to 8s. 6d. to Government property;

With regard to this other defendant, the state of the evidence is as follows. Police Constable Saliba.....;

Kemp also elected to give his evidence. He states that.....;

*Omissis;*

This Court, therefore, finds, as a fact, that this second defendant, Kemp, entered the station threateningly, that is, holding either a stone or a bottle, and that he subsequently smashed some of the window panes. The latter act comes under section 339 (d). The first is an offence not under section 95, but under section 94, in as much as it is a threat consisting in an act at such a distance that the threat could in point of fact be carried out (that is, the entry into the station with a stone or bottle in such circumstances as to make the whole act a hostile one) against persons lawfully charged with a public duty and meant to intimidate them in the discharge of their duty. Had the stone or bottle been thrown at any of the constables (even missing them), the offence would have passed under section 95, as in the case of the first defendant;

Passing now to the case of the last defendant, King, he was found guilty by the First Court of having threatened persons lawfully charged with a public duty whilst in the discharge of their duties, and of causing damage to Government property. According to Saliba.....;

This defendant, in the proceedings before the Magistrate, as may be seen from the record at page 40, requested an adjournment of the case in order to produce in evidence Surgeon Lieutenant Boughton with regard to the injuries which he alleges having sustained. The Magistrate had disallowed

that request on the ground that this defendant had not taken steps to have the usual sub-poena issued. The Magistrate's ruling is in accordance with the law, in as much as King had ample time to sub-poena the witness. Now, on appeal (vide p. 65) this defendant is asking to produce the doctor's certificate, as the doctor had left the Island and there is no reasonable possibility of his return. His request has been properly objected to by the Crown Counsel, in as much as it is obvious that, unless it is verified on oath, the certificate is a mere statement; and besides, this evidence could have been produced in due time before the Court below;

It is also pertinent to observe that, even if King did suffer some injury, it would not appear that this could be material. Both Saliba and Attard stated that they used their truncheons to chase out the ratings from the station, and, of course, it is logical to add that there is nothing unlawful if a police officer uses that "modicum" of force which becomes necessary by the acts of the aggressor; and it is obvious that Saliba and Portelli were justified in using their truncheons on their being faced with more than double their number of bluejackets armed with stones and bottles. There is nothing on which one might hold that more force was used than was necessary;

For the fore going reasons, this Court disposes of the appeal as follows:—

With regard to the first defendant Luck:

Affirms the judgment of the Court below in so far as that Court found Luck guilty of having assaulted with violence persons lawfully charged with a public duty whilst in the execution of the law, but excludes the aggravating circumstances of the assault having been committed by three or more persons, and reverses that judgment in so far as Luck was found guilty of the offence of causing damage to Government property; and upon seeing sec. 95 (a), reduces the term of imprisonment from seven months to four months, taking away the punishment of the fine;

With regard to defendant Kemp;

Reverses the judgment of the Court below in so far as



that Court found Kemp guilty of an offence under section 95, and, in terms of the foregoing reasons, finds him guilty of the minor offence envisaged in section 94, that is, of having threatened a person lawfully charged with a public duty whilst in the act of discharging his duty, with intent to intimidate him, and affirms the first judgment in so far as Kemp was found guilty of causing damage to Government property. The punishment of imprisonment for a term of seven months is consequently varied, and reduced to the punishment of detention for a term of fifteen days, the punishment of the fine of £1 in respect of the other offence being maintained;

With regard to the third defendant, King;

Affirms the judgment of the Court below in this respect, both as regard the merits and the punishment of detention for the term of fifteen days in addition to a fine for the second offence.

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