



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

**Magistrate Dr. Joseph Mifsud B.A. (Legal & Int. Rel.),  
B.A. (Hons), M.A. (European), LL.D.**

**The Police  
(Inspector Frank Anthony Tabone)**

**vs.**

**Tomas Mikalauskas**

Number: 58/2011

Today 11<sup>th</sup> of October 2016

The Court;

Having seen the charges brought against **Tomas Mikalauskas**, aged twenty nine (29) years, son of Antanas and Onute nee' Mikuciauskaite, born in Lithuania on the 21<sup>st</sup> August 1981, residing at 219, Salisbury Walk, Archway, No. 19, London, UK, holder of Lithuanian identity card number 11487291 and Lithuanian Passport number 22065527, accused of having during the month of September 2009 in the Island of Gozo:

- 1) By means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, made any

gain to the prejudice of any other person and thus to the detriment of Jovica Kolakovic. (Art. 308 of Chap. 9);

- 2) And for having on the same date, time and circumstances made any fraudulent gain to the prejudice of any other person and thus to the detriment of Jovica Kolakovic. (Art. 309 of Chap. 9);
- 3) And for having on the same date, time and circumstances made any kind of forgery, or knowingly made use of any other forged document. (Art. 189 & Art, 190 of Chap. 9);

Having seen the documents exhibited and all the acts of the proceedings;

Having seen the Articles of Law sent by the Attorney General on the 3<sup>rd</sup> July 2013 (*a fol.* 170):

- (a) Article 308 of Chapter 9 of the Laws of Malta;
- (b) Article 309 of Chapter 9 of the Laws of Malta;
- (c) Article 189 of Chapter 9 of the Laws of Malta;
- (d) Articles 17, 31 and 533 of Chapter 9 of the Laws of Malta;

Having seen that, during the sitting of the 24<sup>th</sup> September 2014 (*a fol.* 182), the Articles of Law sent by the Attorney General on the 3<sup>rd</sup> July 2013 (*a fol.* 170) were read out, during which sitting the accused declared that he does not object for his case to be tried and decided summarily.

Having heard all the evidence brought forward by the Prosecution;

Having seen all the acts and records of the proceedings;

Having heard the Prosecuting Officer remit himself to the evidence brought forward in these proceedings;

Having heard final submissions by Defence lawyer Dr. Giannella Demarco during the sitting of the 25<sup>th</sup> May 2016;

### **Witnesses**

The Court heard depositions by 15 witnesses:

#### **On the 13<sup>th</sup> July 2011**

*Inspector Frank Anthony Tabone (a fol. 12 et seq.), Inspector Pierre Grech (a fol. 20 et seq.), Jovica Kolakovic (a fol. 23 et seq.), PC323 Cedric Buhagiar (a fol. 25), Inspector Pierre Grech (a fol. 27 et seq.).*

#### **On the 5<sup>th</sup> October 2011**

*Michael Micallef (a fol. 45 et seq.), PC1371 Alfred Grech (a fol. 48 et seq.), Carmel Portelli (a fol. 50 et seq.).*

#### **On the 16<sup>th</sup> May 2012**

*Joseph Debrincat (a fol. 75 et seq.).*

#### **On the 19<sup>th</sup> September 2012**

*Inspector Pierre Grech (a fol. 91), Jovika Kolakovic (a fol. 97 et seq.)*

**On the 17<sup>th</sup> April 2013**

*Carmel Portelli* (a fol. 127 et seq.).

**On the 29<sup>th</sup> May 2013**

*Dr. Martin Bajada* (a fol. 141 et seq.), *Mario Camilleri* (a fol. 162 et seq.).

**On the 2<sup>nd</sup> March 2016**

*The accused Tomas Mikalauskas* (a fol. 198 et seq.).

**The facts of this case**

The facts of this case are in brief as follows:

Tomas Mikalauskas came to Gozo together with his friend Jovica Kalakovic. They stayed in a hotel called The Moby Dick Hotel. When they were there they decided that they wanted to rent a car and come over to Malta with it because when they came they did not realize there were two islands so when they found themselves in Gozo, they wanted to come over to Malta. They told the hotel and they got somebody from a rental agency. This person came and Jovica Kolakovic told Tomas Mikalauskas, the accused, "listen, I don't have my driving licence because I forgot to get my driving licence. Shall we do it in your name?"

Tomas Mikalauskas rented the car, got the car rented in his name, and insurance in his name and paid cash. When the person from the rental car came he asked for a credit card as a guarantee as a precautionary measure which is used by car rental outlets for parking tickets or traffic contraventions only. There was no

payment made on this card. The Bank of Valletta representative confirmed that there was no payment to the Gozo Garage.

Eventually this car that was rented out was involved in a drug deal when Jovica Kalakovic and Tomas Mikalauskas were both charged. After several months, in fact the allegation went back to September two thousand and nine (2009), the complaint (kwerela) asking the police to prosecute the accused was issued in June two thousand and eleven (2011). That is two years down the line.

Mr Jovica Kalakovic said that his card was taken by means of fraud by Mr. Mikalauskas and therefore asked the police to investigate Mr. Mikalauskas.

**Considers:**

### **Articles 308 and Article 309**

The first and second charge relates to fraud. The provisions relating to fraud in our Criminal Code are sections 308, 309 and 310 which sections read as follows:-

*“308. Whosoever, by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, shall make any gain to the prejudice of another person, shall, on conviction, be liable to imprisonment for a term from seven months to two years.*

*309. Whosoever shall make, to the prejudice of any other person, any other fraudulent gain not specified in the preceding articles of this sub-title, shall, on conviction, be liable to imprisonment for a term from one to six months or to a fine(multa).*

The charges refer to the crime of fraud, i.e. with having obtained money by false pretences; alternatively the accused is charged with misappropriation. Accused refutes the charges.

The elements of the crime of fraud are the patrimonial loss of the victim and the consequential gain in favour of the accused. In the judgement **Pulizija vs Anthony Francis Willoughby**<sup>1</sup> dated 12<sup>th</sup> February 1999 the Court of Criminal Appeal (inferior jurisdiction) gave the following definition of the elements of the crime of fraud:-

“Fil-ligi taghna biex ikun hemm it-truffa jew il-frodi innominata irid ikun gie perpetrat mill-agent xi forma ta' ingann jew qerq, liema ingann jew qerq ikun wassal lill-vittma sabiex taghmel jew tonqos milli taghmel xi haga li ggibilha telf patrimonjali bil-konsegwenti qligh ghall-agent (*Il-Pulizija v. Emmanuele Ellul*, App. Krim., 20/6/97; ara wkoll *Il-Pulizija v. Daniel Frendo*, App. Krim., 25/3/94). Dan it-telf hafna drabi jkun jikkonsisti filli l-vittma, propju ghax tkun giet ingannata, volontarjament taghti xi haga lill-agent (*Il-Pulizija v. Carmel Cassar Parnis*, App. Krim., 12/12/59, Vol. XLIII.IV.1140). Jekk l-ingann jew qerq ikun

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<sup>1</sup> Appell Nru. 229/98 deciz mill-Imhalled Vincent De Gaetano

jikkonsisti f' "raggiri o artifizi" -- dak li fid-dottrina jissejjah ukoll *mise en scene* -- ikun hemm it-truffa; jekk le, ikun hemm ir-reat minuri ta' frodi innominata (jew lukru frawdolent innominat) (ara, fost ohrajn, *Il-Pulizija v. Carmelo Cassar Parnis*, App. Krim., 31/10/59, Vol. XLIII.IV.1137; *Il-Pulizija v. Francesca Caruana*, App. Krim. 25/7/53, Vol. XXXVII.IV.1127; ara wkoll *Il-Pulizija v. Giuseppe Schrainer*, App. Krim., 3/3/56)."

From the evidence produced and heard by this Court the charge in so far as it relates to the offence of fraud (i.e. obtaining money by false pretences) does not hold. The evidence to this effect does not, in the Court's opinion, contain and satisfy the constitutive elements that make up the crime. In short, the Court has not, after evaluating the evidence in its totality, perceived any unlawful practice, the use of any fictitious name, the assumption of any false designation or the use of any other deceit, device or pretence leading to the belief of the existence of any fictitious enterprise or of any imaginary power, influence or credit or the creation of any expectation or apprehension of any chimerical event, by which the accused made a gain against the injured party. Nor does the Court see the offence as falling under the so-called innominate crime of fraud as provided in Article 309 of Chapter 9.

### **Article 189**

The third charge relates to forgery.

The Maltese Criminal Code does not define “forgery”. It mentions the different manners in which a forgery may be committed.

Forgery can take place :-

- (a) when a person counterfeits a document - that is to say makes a false document in whole or in part;
- (b) or when he alters a genuine document.

Maltese case law has established the distinction between material falsehood and ideological falsehood, much in line with principles of Italian Law. In fact, in the judgment delivered by the Court of Criminal Appeal in the case “**Il-Pulizija vs Paul Galea**” on the 17th October 1997, Chief Justice Emeritus Vincent de Gaetano decided that :-

filwaqt li fil-każ tal-falz materjali d-dokument jiġi ffalsifikat fl-essenza materjali tiegħu, fil-falz ideologiku d-dokument ikun iffalsifikat biss fis-sustanza u cioe` fil-kontenut ideali tiegħu (ara Antolisei, F., *Manuale di Diritto Penale - Parte Speciale II* (Giuffre`, Milano, 1986) p. 604). Fi kliem Manzini (*Trattato*, v. VI, n. 2296, p.829) ikun hemm falsità materjali meta d-dokument ikun wiehed mhux genwin (jigifieri jew meta l-awtur apparenti ma jkunx l-awtur reali tad-dokument jew meta d-dokument ikun issubixxa alterazzjonijiet wara l-formazzjoni definitiva tiegħu), mentri fil-falz ideologiku, ghalkemm id-dokument ikun genwin ‘non e` veridico, perche` colui che lo ha formato gli



fa dire cose contrarie al vero'. Ghall-finijiet tad-dottrina in tema ta' falsita` ikun hemm dokument kull fejn hemm kitba, attribwibbli ghal persuna identifikabbli, liema kitba tkun tikkontjeni esposizzjoni ta' fatti jew dikjarazzjoni ta' volonta` (Antolisei, F., *op. cit.*, p. 594). S'intendi, b'kitba wiehed ma jifhimx biss is-sinjali alfabetici, izda tinkludi daww numerici, stenografici u anke kriptografici, basta li dik il-kitba tesprimi hsieb li jkun jiftiehem minn kulhadd jew minn certu numru ta' nies. Il-kitba f'dan is-sens tista' ssir kemm bl-id kif ukoll b'mezzi mekkanici, b'mezz indelibbli jew li jista' jithassar, u fuq kwalsiasi mezz li jista' jiehu, imqar temporaneament, il-messagg - karta, parcmi, injam, gebel, hadid, plastik, ecc.

This crime hits at the public trust, at the institutions giving rise to such documents and that are meant to guarantee public trust.

As a crime, the Prosecution has to prove beyond a reasonable doubt the existence of *dolus*. At common law for the crime of forgery to exist, the intent to defraud was always required. However developments in statute law made specific kinds of forgery - of public documents in particular - subject to the requisite intention to deceive. In continental jurisdictions, once that a person is proved to have wilfully altered the truth by the production of a false or altered document, then the fraudulent intention may be deemed to be presumed, without the need to produce further evidence of it.

Proof of actual prejudice suffered by third parties as a consequence of the production of the false document is not necessary to secure conviction. Actual prejudice or the possibility of causing harm may be required to be proved when the falsity relates to a private writing. But not so when the falsity relates to public documents.

In the case of forgery of public documents the law aims at punishing the violation of public trust - irrespective of the harm - actual or potential. Public documents are intrinsically apt to create rights or to transfer rights and therefore their forgery is presumed always to cause harm (given the breach of trust that the public attaches to public documents) whether this harm materialised or not. The potential of causing harm is therefore not an essential ingredient of the crime of forgery that has to be proved by the prosecution. In the case of public documents, the crime of forgery exists even where the forged document is null on account of a defect in its form, or because of the non observance of a *sine qua non* formality.

However while the possibility of causing harm or fraud is not a constituent element of the crime of forgery of public documents, the possibility to deceive is deemed to be an essential ingredient in the crime of forgery whether in relation to both private and public documents.

According to Professor Anthony Mamo in his "Notes on Criminal Law"<sup>2</sup> page 160 : "A perfect imitation is not, of course, necessary. But if the manner of executing the forgery is so clumsy that the forgery itself is obvious almost 'ictu oculi', then the crime of forgery is negated, although there may be another kind of offence (fraud) (cfr. "**Rex vs. L. Cassar**", C.C. 18.11.1941). He quotes from Maino adding that :

La falsita' per essere incriminabile, deve avere attitudine ad ingannare: non sara' necessaria l'imitazione perfetta: ma quando il falso sia cosi' grossolano e tale da dovere essere facilmente riconosciuto, non potra', per mancanza di vera e propria lesione delle fede pubblica, applicarsi il titolo di falso, ma soltanto (nei congrui casi) quello della truffa, se per l'ingnoranza o l'incuria della persona presso la quale fu adoperata la scrittura goffamente falsificata l'uso di questo abbia prodotto un danno.

Mamo adds that the document, though made to appear to resemble the true instrument - and though not being an exact replica - must still "be capable of deceiving persons using ordinary observation, according to their means of knowledge".

If through the use of such forged document the victim is deceived, then it is not possible for the defendant to raise the "question of the manner of execution of the falsity". Such that if the false document

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<sup>2</sup> Volume 2, Page 160, Revised Edition 1954-1955.

- even though it were a bad imitation or a gross counterfeit – deceives the intended victim, then the final juridical aim behind the production of this false document would have been reached – and it is futile to analyse further the potential of deceit posed by such a false document.

The object of the falsification has to be material to the public or private writing itself in its external conditions as a document.

The Court deems that the Prosecution failed to prove beyond a reasonable doubt that the provisions of Article 189 of the Criminal Code have been breached in this case.

**DECIDE:**

Consequently, this Court finds Tomas Mikalauskas not guilty of the charges brought against him and is therefore acquitting him therefrom.

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**Dr. Joseph Mifsud**  
**Magistrate**