



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

MAGISTRATE DR. AUDREY DEMICOLI LL.D.

Today 6th of October, 2016

**Police
(Inspector Yvonne Farrugia)**

vs

Bassam El-Amami

The Court;

Having seen the charges brought against Bassam El Amami holder of identity card number 21488(A) and Travel document number 14614 accused

1. With having in these Islands, between the months of July 2009 and August 2010, misapplied, converted to your own benefit or to the benefit of any other person, anything which has been entrusted or delivered to you under a title which implies an obligation to return such thing or to make use thereof for a specific purpose, that is, the sum of money exceeding two thousand and three hundred and twenty-nine Euro and thirty-seven cents (€2,329.37) to the

detriment of IMSS Co. Ltd. (C 16077), of Emanuel Borg from Fgura, of Margaret Borg from Fgura and that of Emer Said Dudley Ward Borg from San Gwann; and which funds were entrusted or delivered to him by reason of your profession, trade, business, management, office or service or in consequence of a necessary deposit.

2. And for having on the same dates, location and circumstances 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 gain of more than the sum of over two thousand, three hundred and twenty nine Euros and twenty seven Euro cents (€2,329.27) to the detriment of IMSS Co. Ltd. (C 16077), of Emanuel Borg from Fgura, of Margaret Borg from Fgura and that of Emer Said Dudley Ward Borg from San Gwann;

In the case of guilt the Court is also requested to deal with Bassam El-Amami in terms of articles 49 and 50 of Chapter 9 Laws of Malta.

The Court is also hereby kindly requested that, in pronouncing judgment or in any subsequent order, sentence the person convicted to the payment, wholly or in part, to the Registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee, within such period and in such amount as shall be determined in

the judgment or order, as per Section 533 of Chapter 9 of the Laws of Malta.

Having seen all the documents and records of the proceedings including the note filed by the Attorney General (at folio 599) dated 22nd of May, 2015 whereby he transmitted the acts and records of the preliminary investigation to be heard and decided by this Court as a Court of Criminal Judicature and whereby he deemed that from the preliminary investigation there might result an offence or offences under the provisions of:-

- a) Articles 293, 294 and 310(1)(a) of Chapter 9 of the Laws of Malta;
- b) Articles 308, 309 and 310(1)(a) of Chapter 9 of the Laws of Malta;
- c) Articles 49 and 50 of Chapter 9 of the Laws of Malta;
- d) Articles 17, 18, 23, 31 and 533 of Chapter 9 of the Laws of Malta;

Having seen that on the 4th of November, 2011 the accused declared that he had no objection that his case is heard by summary proceedings and decided by this Court as a Court of Criminal Judicature.

Having seen the Note of Final Submissions filed by the Prosecution.

Having heard the verbal final submissions made by Defence Counsel.

Having considered that:

The facts of this case are in brief as follows. In the early months of 2011 the Economic Crimes Unit within the Police Force received a report from Emanuel Borg and Imer Said in their capacity as directors of IMSS Co.

Ltd (C16077) that between July 2009 and August 2010 Bassam El Amami ,a political refugee in Malta, had misappropriated the amount of approximately €25,000 which amount was given to him with the specific purpose of finalising the work relating to the realisation of a social Housing Project in Algeria. Bassam El Amami was introduced to Mr Borg and Ms. Said as the owner of Bitmac Algeria which was a company that had been awarded a tender for a social Housing Project in Algeria. The accused told Said and Borg that the Algerian Authorities were requesting a bank guarantee of 1.5 million Euro and requested IMSS Co Ltd to help him source someone who could provide the said guarantee and join the project with a potential return of 30% on the sum invested. The accused told complainants that Bitmac Algeria was the franchisee of Bitmac Malta and that he had personally invested €950,000 in the project and they were shown documents certifying that the said amount had been paid for the bid bond on the project. IMSS introduced the accused to companies in Italy who could provide him with the required guarantee and funds and they financed the travel expenses. They also agreed to lend money to the accused to finance the expenses relating to the realisation of the project and three bills of exchange were in fact signed when the money was handed over to the accused. IMSS also found an Irish Company, Marley Constructions, which was willing to consider issuing the required guarantee but requested a visit onsite Algeria with the purpose of assessing the feasibility of the project. None of the companies introduced to the accused by IMSS Co. Ltd issued the required guarantees or financed the Housing Project because the accused never travelled with them to Algeria to enable them to assess the feasibility of the project and carry out due diligence. In May 2010 the accused informed Manley that he was unable to go with them to Algeria because of lack of funds and because the project was on a stop notice.

When the complainants requested the accused to pay back the money given to him after he was asked to give a detailed breakdown of how the money given to him was effectively used the accused said that the money was lent to him for personal use and that he did not have the money to pay it back. IMSS on the other hand always insisted that they had lent the money to the accused for the specific purpose of funding the follow up to the project in Algeria and to ensure that the said project would materialise. They also insisted that the accused had agreed to pay back the amount lent to him within three months. Furthermore when Emanuel Borg spoke to Hector Camilleri from Bitmac Malta he found out that it had infact been the said Camilleri who had paid the €950,000 for the initial funding of the project and he had then delegated the project to the accused and also gave him the money to set up Bitmac Algeria which was to be a franchisee of Bitmac Malta. Hector Camilleri confirmed all this to the Police and said that he had not been willing to provide the funds for the requested bank guarantee.

The accused during the course of the investigations conducted by the Police gave two statements¹ whereby he said that he was an architect and civil Engineer by profession and that he operated two companies Bitmac Algeria in Algeria and Jowfa Group Ltd in Malta. He explained how he was introduced to IMSS Co Ltd and Emanuel Borg and Imer Said and said that the money passed on to him by the latter was used for translating documents from French to English as requested by the Italian company introduced to him by IMSS and required for the Nigerian Bank that the Italian Company had contracted with for the purpose of issuing the bank guarantee for the Algerian Housing Authority. The accused asserted that he had transferred all his shares in the company

¹ Doc YF 1 and doc YF 3 at folio 31 to 34 and 36 to 39

in Algeria to the Italian company because the latter told him that otherwise the guarantee would not be issued by the bank. In his first statement the accused also said that the Italian company had accepted to pay for the translations.

In his second statement the accused confirmed that he had used €5,000 from the money passed on to him by IMSS to pay university fees relating to his daughter but said that Emanuel Borg and Imer Said were duly informed about this. He also said that he had used the rest of the money for the translation of document expenses, travel and legal fees which were all related to the project in Algeria. The accused denied having used the rest of the money for personal matters. He also said that the project fell through because the guarantee never materialized and that he had in the process lost his shares in the company in Algeria and the project. The accused also said that the Italian Company never paid him for the translation expenses. He confirmed however that the invoice for the translation was signed by his wife for KBL Limited when in fact she had no authority to sign. He however specified that Imer Said was aware of this fact and that she was the one who suggested it saying that if the invoice was signed by him the Italians would not accept to pay for the expenses regarding the translations. The accused also confirmed that IMSS had also introduced him to Manley Group who were initially willing to provide the bank guarantee but he denied that that the project fell through because he had not travelled with them to Algeria to show them the land and introduce them to the Algerian Housing Authority. He insisted that the deal did not go through with Manley because they had found a more interesting and lucrative project in Europe. The accused also said that he had forwarded by email a breakdown of expenses when so requested by IMSS.

Having considered that:

In these proceedings the accused is being charged with fraud and misappropriation in terms of Section 308, 309 and 310 and 293 and 294 of the Criminal Code.

In relation to misappropriation the Court refers to what was said by the Court of Criminal Appeal in a judgement delivered on the 9th June 1998 in the case 'Police vs Enrico Petroni et' in relation to the elements of the said offence i.e. the following:

“Dana ir-reat isehh meta wiehed (1) jircevi flus jew xi haga ohra minghand xi hadd; (2) bl-obbligu li jrodd dawk il-flus jew dik ix-xi haga lura jew li jaghmel uzu minnhom b'mod specifiku;(sottolinjar tal-Qorti) (3) u minflok ma jaghmel hekk idawwar dawk il-flus jew dak l-oggett bi profitt ghalih jew ghal haddiehor.”

Illi ghalhekk l-awtur ta' dana ir-reat irid ikollu l-intenzjoni specifika illi l-oggett li jigi fdat lilu u li jkun qed jippossjedi ghal ghan specifiku, jigi imdawwar minnu bi profitt ghalih jew ghal haddiehor daqs li kieku huwa kien il-proprietarju ta' l-istess oggett.

Illi kif jispijega l-awtur Francesco Antolisei:

“La vera essenza del reato [di appropriazione indebita] consiste nell’abuso del possessore, il quale dispone della cosa come se ne fosse proprietario (uti dominus). Egli assume, si arroga poteri che spettano al proprietario e, esercitandoli, ne danneggia il patrimonio” (Manuale di Diritto Penale, Giuffre` (Milano), 1986, Parte Speciale, Vol. 1, p. 276)

This Court also refers to another judgement of the Court of Criminal Appeal (Police vs John Gauci decided 14th February, 1997) where a very eloquent explanation of the elements of the offence in question was given

“Minn ezami ta' l-artikolu 293 tal-Kodici Kriminali jidher car li wiehed mill-elementi essenzjali ta' l-appropriazzjoni indebita huwa kostitwit mill-frazi: "... taht titolu illi jgib mieghu l-obbligu ... li jsir uzu minnha specifikat ...". Specifikat minn min? Ovvjament minn min ikun ikkonsenja l-haga lill-agent u minn hadd izjed. Hija l-persuna li tikkonsenja l-haga u hadd hliefha li jkollha jedd timponi l-obbligu ossia tispecifica lill-agent dwar kif ikollu jaghmel uzu mill-oggett ikkonsenjat lilu minnha. Jekk il-konsenjatur jaghti flus lill-agent biex dan bihom jixtrilu dar, l-agent jikkommetti r-reat ta' appropriazzjoni indebita jekk minflok jaghtihom karita'. Jekk il-konsenjatur jaghti flus lill-agent biex dan jixtrihom armi bi skop ta' serq, l-agent ikun approprja ruhu mill-flus indebitament jekk jaghtihom karita', apparti l-kwistjoni tal-moralita'. Jekk jixtrihom armi, allura l-agent ikun ghamel uzu mill-flus kif specifikat. F'kull kaz, fl-indagini dwar il-htija jew le ta' appropriazzjoni indebita, ghandha ssir prova ta' l-uzu tal-

haga specifikata mill-konsenjatur u provata' jekk l-agent ma ikunx ghamel mill-haga dak l-uzu jew uzu divers."

*Illi dwar id-dolo mehtieg ghal kumissjoni ta' dana ir-reat il-Qorti taghmel pjena referenza ghas-sentenza **Il-Pulizija v Dr. Seigfried Borg Cole** deciza mill-Qorti ta'l-Appell Kriminali fit-23 ta' Dicembru 2003 fejn il-Qorti hemmhekk ghamlet referenza ghal dak li qal il-gurista Luigi Maino fuq il-kuncett tad-dolo necessarju ghal ezistenza ta' dan r-reat. (**Commento al Codice Italiano UTET (1922) Vol IV para 1951 pagna 105 – 106**):*

“Finalmente, a costruire il delitto di appropriazione indebita e' necessario il-dolo. Trattandosi di delitto contro la proprieta', a scopo d'indebito profitto per se' o per un terzo, il dolo sara' costituito dalla volontarieta' Della conversazione con scienza della sua illegittimita', e dal fine di lucro; onde colui che si appropria o rifiuta di consegnare, nella ragionevole opinione d'un diritto proprio da far valere, non commette reato per difetto di elemento intenzionale. Per la stessa ragione, e per difetto inoltre di elemento obiettivo, non incorrera in reato chi ne disporre della cosa altrui abbia avuto il consenso del proprietario o ragionevole opinione del consenso medesimo ... il dolo speciale nel reato di appropriazione indebita e' [come nel furto e nella truffa] l'animo di lucro, che deve distinguere appunto il fatto delittuoso, il fatto penale, dal semplice fatto illegittimo, dalla violazione del contratto, dell'inadempimento della obbligazione: osservazione questa non inopportuna di fronte alle esagerazioni Della giurisprudenza ed ai devianti della

pratica giudiziale che diedero spesse volte l'esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale. Rettamente pertanto fu giudicato non commettere appropriazione indebita [e neppure il delitto di ragion fattasi, per mancanza di violenza] il creditore che trattiene un oggetto di spettanza del suo debitore a garanzia del credito; l'operaio che avendo ricevuto materia prima da lavorare, si rifiuta, perche' non pagato dal committente, di proseguire nel lavoro e di rendere la materia ricevuta; l'incaricato di esigere l'importo di titoli, che non avendo potuto compiere tale esazione, trattiene i titoli a garanzia del dovutogli per le pratiche inutilmente fatte allo scopo di esigere. In generale la giurisprudenza e' costante nel richiedere come elemento costitutivo imprescindibile il dolo."

As to the charge relating to fraud the Court refers to what was laid down in a judgement of the Court of Criminal Appeal of the 12th February 1999 in the case "Police vs Frances Willoughby" whereby the Court distinguished between the offences laid down in Section 308 and 309 of the Criminal Code in the following manner:

"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 partimonjali 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, proprju 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 jikkonsisti f' "raggiri o artifizji" – 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 ohrain, 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)."

After having examined the acts of these proceedings which include voluminous documentation produced by the parties which was meticulously examined by this Court and after having considered the legal elements required for the offences of misappropriation and fraud to be deemed to subsist the Court is of the opinion that the Prosecution has managed to prove to the level of beyond reasonable doubt that the accused is guilty of all the charges brought against him.

This Court has reached this conclusion for the following reasons:-

1. Emer Said (Vol1, fol 71-80) after confirming on oath the report lodged with the Police stated:

“... in May 2010 El Amami wrote to Manley Construction and said that he was unable to turn up in Algeria for two reasons..”

“.. the second reason was because the project that he had been asking us to promote for a whole year and a bit was actually on a stop notice”

“He had signed documents, contracts with Smiriglia and about to go to Algeria with Manley Construction to a project that had a stop notice on it.”

“He wrote us an e-mail stating that he had used the funds for the sake of his family, to educate his daughter, he has a relative living with him and his wife had cancer and she needed he was paying for her cancer treatment so obviously we realized now that our funds were not being used for the purpose that we had give, loaned them to him to promote this project.”

2. The file with numerous documents confirmed on oath by Emer Said on the 1st December, 2011 marked as Doc MM1 (Vol II, folio 106) corroborates all that was stated by the said witness and her father.
3. Emanuel Joseph Borg (Vol 1, Folio 85-91) confirms on oath that the money given to the accused was “handed over in pieces, every month or two months in order to promote his business, his project in order to make the fruitition but he knew all the time from July 2009 to the last payment that the last thing that he wrote to there was nothing, there was a stop order from the government.”
4. Antonella Grech representing MFSA exhibited on oath the Memorandum & Articles of Association of KBL Group Limited C31938 marked as Doc AG1 (Folio 50 et seq.). It confirms that the

director is Khaldi Benaissa and not Saosan Nasr (the accused 's wife who signed the invoice for the translations on behalf of KBL Limited).

5. In the Replies to the Rogatories from Ireland – (Vol II, folio 263 et seq) wherein Mr Gabriel Manley, director of Manley Construction Limited confirm the facts as stated by Emanuel Borg and Emer Said. Manley in fact confirms that he never knew about any stop order on the works until the accused used this as an excuse not to travel with them to Algeria.
6. In The Replies to the Rogatories from Algeria – (Vol II, Folio 269 et seq) (translations at Vol III, folio 326 et.seq) it is established that although Bitmac Limited is registered as a company in Algeria , it never effected] any activity nor did it ever deposit fiscal and financial declarations.

“.. visit written by the agents of the tax services of Tissemsilt on the 24/02/2010, they have concluded that the headquarters of the said company were closed and following the evidence of the neighbours who affirmed that the headquarters had been closed for 8 months, as well as the magnetic card of the fiscal identity card of the company, is still at the tac office and has not been retrieved by the administrator so far, and through this it results that the creation of the said company was made only to benefit from some advantages without effecting any activity, so it was just to cover other activities; and also because the names El Amami Bassam obtained markets for the construction of lodgings at Tissemsilt and he signed the order of execution of works on the 23/07/2008 in the name of

Bitmac Limited Algeria whose headquarters were at Straouli – Wiay D’ Alger, while he created another company with the almost the same name on the 09/08/2008 but he used a stamp carrying the name: Bitmac Limited Malta”

“Regarding the projects obtained by the company. The said company obtained these markets as it was the only one to submit a proposal.. whose authenticity we could not verify ... OPGI stopped all contracts with Bitmac Limited by decisions taken on 20/04/2009 and 02/05/2009.”

7. In the Replies to the Rogatories from Italy – (Vol II, folio 251 et seq) and translated by Dr A Licari to the English Language (Vol III, folio313 et seq) Antonino Smiriglia states “After three meetings with Bassam El Amami and the examination of the documents produced by him I personally formed the idea about him that he was a person of little reliability”.
8. The replies of the Rogatories from the UK – (Vol III, folio 368 et seq.), confirm that the bank documents regarding CITI bank used by Bassam El Amami are not authentic documents.

From all the above one can conclude that the project in Algeria was already put in a stop notice by the Algerian authorities on the 25th May 2009 i.e. before the accused was introduced to Emanuel Borg and Imer Said. This means that when he asked the latter to introduce him to third parties who could participate in the project and provide a bank guarantee and when he asked for money to help him fund the expenses relating to the project he was fraudulently giving the impression that the

project was a viable one and that the authorities in Algeria were only awaiting the bank guarantee. Moreover from the evidence of Imen Said and Emanuel Borg it is clear that the money they gave to the accused was being lent to him for the sole purpose of funding his expenses for the project whilst on the other hand he chose to use part of the money, if not all, for his personal use i.e. the payment of his daughter's university fees.

The Attorney General in the Note of the Renvoie of the 2nd May 2015 also indicated that the accused could be found guilty in terms of Section 49 and 50 of the Criminal Code. In this regard the Prosecution exhibited a copy of the judgement dated 7th October 2005 (Doc YF7 at folio 43 et seq) whereby the accused was condemned a two year imprisonment term which in terms of Section 28A of the Criminal Code was suspended for a period of three years. Inspector Neville Xuereb (vide folio 597 et seq) confirmed that this judgement refers to the same accused in these proceedings. The accused shall therefore also be found guilty of being a recidivist in terms of Sections 49 and 50 of the Criminal Code.

When considering the applicable punishment the Court took into consideration the fact that the accused is a recidivist as well as the seriousness of the offences for which he is being found guilty and deems that an effective prison term would be the most adequate form of punishment.

After having seen the sections of the law indicated by the Attorney General in the Note of Renvoie dated 22nd May, 2015 and in particular Sections 293, 294, 308, 309, 310(1)(a), 49, 50, 17, 18, 23 and 31 of the Criminal Code the Court finds the accused guilty of all the charges

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brought against him and condemns him to two and a half (2½) years imprisonment.

Magistrate