

Court of Magistrates (Malta)

as a Court of Court of Criminal Judicature

Magistrate Dr Aaron M. Bugeja M.A. Law, LL.D. (melit)

The Police

(Inspector Carol Fabri)

vs

Steven Glenn Paton

15th March 2017

The Court after seeing the charges in respect of **Steven Glenn Paton**, holder of Maltese ID 57818A who was charged as follows :-

- *With having, in these islands, on the 27th March 2015 at various times during the day, from Hugo Boss in Ross Street, St.Julians...committed theft of a number of items and cash which theft exceeds €232.94 but does not accede €2329.37, which theft is aggravated by amount and person to the detriment of SARTO Ltd or/and Vincent Farrugia owner of Hugo Boss*

Having seen that during the sitting of the 7th October 2015, this Court ordered that proceedings be carried out in the English language after that it ascertained that the accused is English speaking in terms of law;

Having seen that on the same date the Prosecuting Officer confirmed the charges on oath.

Having seen that during the examination of the accused in terms of Article 392 and 370(4) of the Criminal Code the accused declared that he found no objection to his case being dealt with summarily;

Having also seen that the Attorney General declared by means of a note exhibited at fol 4 that he granted his consent to this case being dealt with summarily;

Having seen that the accused, in reply to the question posed in terms of Article 392(1)(b) of the Criminal Code by the Court declared that he was not guilty;

Having seen the documents supplied and having heard the testimony of the witnesses produced;

Having seen the records of the proceedings as well as the criminal record sheet of the accused;

Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel to the accused in the sense that they were resting on the evidence produced;

Considers the following : -

That from the testimony of Bernice Debattista, Conrad Buttigieg, Michael Calleja and in particular that of Vincent Farrugia, it transpires that the management of this retail outlet was concerned with the fact that there resulted to be a substantial amount of missing goods from their outlet worth more than sixty thousand euros which led to an increased supervision by the same management.

The incident involving the accused took place between the 26th and 27th March 2015. None of the abovementioned witnesses claimed that the

accused was behind these shortfalls. But they noted a certain strange behaviour pattern that started to raise suspicions on the accused. In a nutshell, Vincent Farrugia boiled down this whole case to three main issues:– (a) about seventy euros that were found hidden in a cupboard; (b) exchanging foreign currency tendered by customers and retaining the difference in currency after depositing the price in euro equivalent in the shop's cash till; (c) failure to punch a belt worth eighty five euros – fol. 108.

As for the belt in question, it transpires that this was truly delivered to a customer, but for some reason the accused failed to register this transaction. The Court believes that on a balance of probabilities this was a mistake on the part of the accused and therefore cannot be found guilty of theft on account of this shortcoming.

As for the amount of money found in shop's cupboard, the Court deems that the Prosecution proved beyond reasonable doubt that this was the accused's doing. The Court considers this strange practice to be related to another even stranger practice that the accused was proved to do. Sometimes the shop's customers paid the price of items purchased in Pounds Sterling or United States Dollars. The witnesses claim that according to company policy these monies had to entered into the company computerised system that accepted both Sterling and US Dollars. However

it was also proved that the accused used to call at a Foreign Exchange Bureau close by (W&J Coppini & Co.) and exchange monies tendered by way of purchase price in Pounds Sterling or Dollars in euros. He would then retain the difference between the purchase price in euros, change due and the currency tendered after depositing the price in euro equivalent in the shop's cash till.

The Prosecution contends that this constitutes theft.

This Court considers that if in execution of this practice the accused did in point of fact deposit the purchase price in euros established by the shop's management for each item paid and retain the difference in exchange currency in his pockets, then the accused cannot be stated to have committed the crime of theft. The Maltese Criminal Code does not define "theft". However Maltese Courts have followed the definition of Carrara: "*Contrectatio dolosa della cosa altrui, fatta invito domino, con animo di farne lucro.*"

According to Professor Anthony Mamo in his notes on Criminal Law, this definition provides five elements that need to be fulfilled in order for the crime of theft to be deemed integrated.

1. The *contrectatio* of a thing.
2. belonging to others.

3. made fraudulently.
4. without the consent of the owner.
5. *con animo di farne lucro* – the intention to make a profit.

The *contrectatio* is the taking of an object belonging to the passive subject. The active subject must take the object belonging to the passive subject with the intention to take it and deprive him permanently from this object. By so doing the active subject appropriates himself of an object belonging to the passive subject without the intention of returning it to him. Carrara adds that :

Il dolo specifico del furto consiste nell'intenzione di procurarsi un godimento o piacere qualunque coll'uso della cosa altrui ... per lucro qui non s'intende un effettivo locupletazione ma qualsiasi vantaggio o soddisfazione procurata a se stesso.

In this case it was not proved beyond a reasonable doubt that the accused took the purchase price or part of it to the detriment of the shop owners.

While the Court is convinced beyond a reasonable doubt that the money in the cupboard were his own making, the Prosecution failed to prove beyond a reasonable doubt that this money was the result of "theft" according to Maltese Law. On a balance of probabilities this money could have been the product of a profit he made out of the difference in the more favourable

daily rate of exchange (offered by the Foreign Exchange Bureau W&J Coppini and Co) between the purchase price in euros (that was duly deposited in the cash till) and the amount in Sterling or US Dollars paid by the customers which instead of depositing in the cash till, he pocketed himself. The shop owners were entitled to their purchase price in euros, being legal tender in this jurisdiction – and on a balance of probabilities it was proved that the accused did return this amount to the shop owners. And strictly speaking not even the shop owners were entitled to profit from the different daily rate of exchange between Euros and other currencies, which difference ought to have been refunded to the customers, given that any excess in the exchange rate difference over and above the price in euros is to be deemed to remain the property of the customer, who was entitled to its refund.

This Court cannot consider the retention of this difference in exchange rate as “theft” but it considers this action as being more akin to the crime of misappropriation, which in Article 293 of the Criminal Court expounded as follows :-

293. Whosoever misapplies, converting to his own benefit or to the benefit of any other person, anything which has been entrusted or delivered to him under a title which implies an obligation to return such thing or to make use thereof for a specific purpose, shall be liable, on conviction, to imprisonment for a term from three to eighteen months:

Provided that no criminal proceedings shall be instituted for such offence, except on the complaint of the injured party.

The Court is under no doubt that the customers paid the price requested by the accused in accordance with the shop's indication of the relative price in Sterling or US Dollars, which rate was not necessarily actual and precise. He converted to his own benefit the difference in the more favourable exchange rate offered by the Foreign Exchange Bureau – a practice that is not to be expected to have been approved by the paying client who was still entitled to the difference in the exchange rate.

The accused was expected to return the difference to the paying client or at least abide by the payment instructions of the customer – to deliver the foreign currency tendered directly in the shop's till rather than misapplying the difference in exchange rate by converting it to his benefit. Then it would have been for the management of the shop to face the music if they profited unduly on the difference in exchange rate, if any customer really questioned or cared to ask in the first place.

However given that accused was not charged with this crime of misappropriation the Court cannot find him guilty thereof. Article 476(2)

of the Criminal Code,¹ while being directly applicable to proceedings before the Criminal Court during a trial by jury, is not likewise made applicable to proceedings before the Court of Magistrates by Article 525 of the Criminal Code. Hence this Court cannot convict and punish the accused for misappropriation, despite him having been accused of aggravated theft.

Decide

Consequently, in view of the above, this Court finds the accused not guilty of the charge proffered against him and consequently acquits him from the said charge.

Delivered today the 15th March 2017 at the Courts of Justice in Valletta, Malta.

Aaron M. Bugeja.

¹ (2) If a person tried for the theft, whether simple or aggravated, of any object is found not guilty of that charge, it shall be lawful for the jury to find him guilty of misappropriation of that object or of the offence contemplated in article 334 with regard to that object, if there is proof to that effect; and, conversely, a person tried for misappropriation or for the offence contemplated in article 334 may be found guilty of theft, whether simple or aggravated, of the object concerned if there is proof to that effect:

Provided that in no case shall the punishment be more severe than that demanded in the indictment.