



**Court of Magistrates (Malta)
As a Court of Criminal Judicature**

Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

**The Police
(Inspector Hubert Cini)**

-vs-

Brian Leonard Jones, holder of Identity Card number 12564A

Acts of the Criminal Inquiry No.: 273/2016

Today, the 26th day of September, 2017

The Court,

Having seen the charges brought against the accused Brian Leonard Jones for having:

With several acts committed by him, even if at different times, which constitute violations of the same provision of the law, committed in pursuance of the same design, between the 12th of October, 2006, and 12th of October, 2011, in Shuberg Crt A, Flat 3, Triq in-Nadur, Marsascala, Malta, and in these islands committed theft of electricity of more than €2,329.37, theft aggravated by means, amount, place and time to the detriment of Enemalta Corporation and/or other persons or entities.

In the same place, time, date and circumstances caused damage any electric machinery or cable, or cause the loss of electric current.

The Court was requested to apply Article 533 of Chapter 9 Criminal Code of the Laws of Malta.

Having seen the note of remittal by the Attorney General indicating the Articles of Law in terms of Article 370(3)(a) of Chapter 9 of the Laws of Malta dated 23rd October, 2013.

Having heard the accused declare that he does not object to the case being tried summarily by this Court.

Having heard the evidence.

Having heard final submissions by the parties.

Considers,

Whereas **Inspector Hubert Cini** testified that upon receiving a report from Enemalta relating to an irregularity regarding the accused's electricity meter, he had interrogated the accused who had released a statement¹. In that statement, the accused had recalled that Enemalta personnel had informed him that his meter had been tampered with. The accused had proceeded to inform Enemalta that he had nothing to do with the tampering and was subsequently requested to go to Enemalta offices where having been informed that the readings fluctuated he was requested to settle the amount. Jones refused to reach such a settlement given that he insisted that he had nothing to do with any theft of electricity. He added that the meters were situated in the lift room which is found in the common garage.

On his part, **PC916 Samuel Veneziani** testified that he had drawn up a **Current Incident Report**² after an Enemalta representative had found an electricity meter which had been tampered. The police were given details of the meter number and its last reading.³ The constable confirmed that he was not present when the irregularity was noticed but relied on the report made by Busuttil.⁴

¹ Fol.9-10; Dok. HC fol.44-45

² Fol.5

³ Fol.7

⁴ Fol.59

Whereas **Michael Buttigieg** produced billing statements relating to the accused commencing in June, 2006 until the 1st July, 2010.⁵ The said bills clearly indicate that partial payments were being made between one bill and another (*'payments received'*⁶) although these were a far cry from the amount invoiced. Moreover, the said bills fail to indicate in any clear manner other amounts which were being deducted from the bills; this emerges even from a cursory examination of the amounts indicated as *'invoice amounts'* and *'total due'* on the said bills.

Whereas **John Vella**, co-ordinator with Enemalta, explained how in the midst of the replacement of electricity meters, fitter Robert Busuttil informed him that he had noticed a meter which had its blue seal tampered with and its screws loosened off. The meter was levered on top of two wedges placed at the back in such a way that whilst one is still receiving electricity the meter was not working. The witness explained that *"Every mechanism determines when the meter works and when it doesn't. So, when the customer, or anyone, was putting the wooden wedge behind the meter, he was putting it higher to bring it in such a position that the screws don't make contact and the meter doesn't work and when you take them off, there is contact and the meter works. We had elevated the meter, sealed it in a bag and all the evidence is sealed in a bag here so that it can be exhibited in Court"*.⁷ On cross-examination Vella confirmed that they had confirmed that the electricity meter in question was that pertaining to the accused since they had turned off the electricity and lights had gone off in his flat. The witness failed to confirm that the meter in question belonged to the accused but remembered that it was in the common area.⁸

Whereas **Robert Busuttil**, senior distribution tradesman with Enemalta, testified how he was changing old meters to smart metres and in one address he noticed *"the meter had the blue seal of the base cover tampered with and when we opened the base cover we saw that the shunt's screw was loose and that the meter had like something to push it out and also had the two bottom screws loose so that it could be moved."*⁹ The accused was informed of these findings *"because of that piece of wood it was being pushed out and actually even where there was the wooden wedge there was old grime showing*

⁵ Fol.64 et seq

⁶ Fol.74, 76

⁷ Fol.103

⁸ Fol.105

⁹ Fol.107-108

that someone had been repeatedly touching the piece of wood, taking it out and sticking it back in. The meter was replaced and we confiscated it and placed it in an evidence bag in his presence.”¹⁰ Upon cross-examination the witness failed to determine the date when the said tampering was taking place.

Whereas **Alan Chetcuti** testified that upon the installation of the new meter the average daily consumption shot up to double the amount, that is from 11.2 daily units to 22.36 daily units. Based on this comparative exercise Enemalta calculated that **€3,294.06**¹¹ represented unregistered electricity availed of by Jones, whilst once penalties and interest were added on, the amount being claimed by Enemalta reached €4,271.18.¹² The meter was registered in the accused’s name on the 14th March, 2001, as the meter card manifests.¹³ The witness explains that the bone of contention between Enemalta as the complainant, and the accused, was the amount being demanded by the Enemalta as being owed to it by Jones: *“Our estimate is computed for the five years preceding the inspection date so Enemalta is claiming, we consider that there has been an irregular consumption from 2006 onwards the maximum Enemalta is allowed by law..”*¹⁴. Chetcuti had requested to testify at a later stage to confirm whether between 2006 and 2009¹⁵ the meter was registered in the accused’s name, yet the prosecution closed its case without reproducing this witness. However, **Michael Buttigieg** as already indicated produced a number of bills for the said period wherein Jones clearly appears as the registered consumer. One would also have expected that the final estimate would have indicated, in a clear manner, whether any deductions of payments already effected, had been taken into account.

Whereas the accused **Brian Leonard Jones** testified that he became the owner of the premises in question in December, 2001.¹⁶ The meter is sited in the lift room on the garage level in a common area of the block of flats, where all the metres are affixed.¹⁷ The lift room has a door with a lock which key is common to all the block’s inhabitants,¹⁸ thus anyone

¹⁰ Fol.108

¹¹ Doc.AC1 a. Fol.56

¹² Fol.45; Dok. AC2 a. fol.57

¹³ Fol.54

¹⁴ Fol.48

¹⁵ Fol.46 and 49

¹⁶ Vide contract of sale a fol.96

¹⁷ Fol.83

¹⁸ Fol.90

can gain access to it by going through the garage area through an unlocked door.¹⁹ Jones denied tampering with the meter and said he got to know of the tampering the day it was meant to be changed.²⁰ He had bought the flat in shell form and could not remember whether the meter was already installed at the time or not. Asked to explain how the residents knew which of the meters was theirs he replied *"We knew there were 3 meters and there were 3 residences but that's all. Then the meter reader comes round and reads the meter and we, there is no actual or there wasn't any actualconnection between us and the meters."*²¹ He continues that when he had found out which his meter was he had indicated this by writing the numbers of the flats to which the meters pertained on the wall with a marker pen, although this happened when the meters were about to be changed *"That's when I found out which and I marked the wall to show which was which and the water meters as well"*.²² Cross-examined the accused continues *"In this room which had no door on it. So after sometime, how many years I don't know maybe 2 or 3 years. We decided to put a cupboard on this to cover the meters, a lockable cupboard which would not always lock And then we had this other door which also had a lock.... The meter was indicated by a number because I put the number on it. No one really told me, I don't know how I found out which was my meter to be honest"*.

Whereas **Angelo Spiteri** testified that he had sold the apartment which formed part of a block of six apartments and a garage, to the accused. Although a gate was installed to protect the block, it is never kept locked. Spiteri explained, with some misgiving, the lack of security of his block of flats when describing how access to the meters could be attained *"First you open the gate supposedly...[but] it was always open. Then another access to a small room to access the lift and the meters. There was a door always wide open."*²³

Whereas **Marlene Jones** testified how ARMS personnel had rang her door bell and asked for her husband. Since he wasn't in at the time she went downstairs to the meter room herself *"Well I go down with the lift, you know, and there is a room there with meters. All the meters there. And they found these two men with a meter in their hand and they told me that they*

¹⁹ Fol.84

²⁰ Fol.86

²¹ Fol.88

²² Fol.92

²³ Fol.116

found something had been tampered or something. But I don't know anything about meters or if it was our meter or not. I didn't know that..... They were holding it, you know. They had it in their hands.". Jones confirms that the meter had already been removed when she was told that it was her meter.²⁴ The witness also confirmed that access to the meters is gained through the garage which although is fitted with a lock this is generally left opened. She added that all tenants had a key to the lift room which housed the meters of all the block's tenants.

The Court finds it very difficult to believe that for 10 years, having acquired the place in December, 2000, until the day the meter reader arrived to change the meter in 2011, the accused nor his wife, had never bothered to check which was their residence's meter. Nonetheless the prosecution's case is riddled with the following difficulties which militate against the finding of guilt on the part of the accused:

The estimate computed by Enemalta went back five years and was based on the actual consumption registered on the day the meter was changed. At that time the appliances utilising electricity were those appearing on the document headed '*Report of Surprise Inspection*'.²⁵ No evidence was produced in a bid to determine whether consumption had been regular nor was evidence produced to determine whether in the period on which the estimate was based, the appliances were the same, thus accounting for a finding that over five years the accused consistently utilised 22.3 units of electricity daily. Although such an estimate may suffice for purposes of civil proceedings, the same cannot apply in criminal proceedings where a much higher level of proof, that beyond reasonable doubt, needs to be proven.

More importantly, **no expert was appointed** so as to determine whether the seal, the loosened screws or the wedge actually contributed to the under-registration of electricity and if so, to what extent. Whilst Enemalta personnel could testify to the facts attested by them, their conclusions are merely opinions, albeit and admittedly learned opinions. For a finding of guilt it was imperative that a court expert be appointed so as to determine

²⁴ Fol.120

²⁵ Fol.33

whether the meter: a) was indeed tampered with and b) whether the tampering led to electricity theft.

Reference shall also be made to the judgement by the Court of Magistrates (Gozo) in the names **Il-Pulizija vs Saviour Tabone**:²⁶

Fl-artikolu 264(2) tal-Kapitolu 9 tal-Ligijiet ta' Malta jinghad testwalment:

“Fil-kaz ta' ksur ta' kanni tas-servizz pubbliku ta' l-ilma jew tas-servizz tal-gass, jew tal-fili jew gumi fis-servizz pubbliku, il-fatt li jkun hemm mezzi qarrieqa li bihom wiehed jista' jkollu l-uzu jew il-konsum illegittimu ta' dan l-ilma, gass jew kurrent ta' l-elettriku, jew li bihom jista' jwaqqaf jew ibiddel il-kejl jew marker fil-meter tal-kwantita mehudha jew kunsmata jitqies sakemm ma jigix pruvat il-kuntrarju, bhala prova illi d-detentur tal-fond jew il-persuna li jkollha f'idejha il-fond fejn ikunu jinsabu l-mezzi qarrieqa, jaf jew taf b'dan l-uzu jew konsum ta' ilma, gass jew kurrent elettriku skond ma jkun il-kaz.”

Illi dina hija presunzjoni li giet deskritta f'sentenza moghtija mill-Qorti tal-Appelli Kriminali f'sentenza moghtija fis-16 ta' Lulju 1990 fl-ismijiet **Il-Pulizija vs Raymond Abela**, bhala “presunzjoni feroci” u komplet tghid: “La l-presunzjoni hija daqstant feroci l-Qorti tifhem li biex tapplikaha il-mezzi qarrieqa jridu jirrizultaw konkluzivament u mhux semplicement b'mod illi johlqu suspett ... il-mezzi qarrieqa jridu jkunu jistghu jwasslu ghal dak l-effett li bihom jista' jwaqqaf jew ibiddel il-kejl jew il-markar.”

Issa l-fatt illi is-sigill ta' fuq kien miksur sabiex ghalhekk l-cover tal-meter tad-dawl seta' jinqala facilment kif ukoll il-fatt li kien hemm it-trab fuq gewwa tal-meter tad-dawl ma jwassalx necessarjament ghal konkluzjoni illi kien hemm serq tal-kurrent tal-elettriku. Jista' jkun hemm suspett illi dana seta' sehh minhabba l-fatti indikati mill-espert, izda minn imkien mill-provi ma jirrizulta illi verament dana kien il-kaz.....

Illi kif ikkonkludiet il-Qorti fis-sentenza hawn fuq iccitata “**din il-Qorti qatt ma wasslet biex tikkundanna lil xi hadd semplicement fuq suspett.**” Illi ghalkemm jista' ikun hemm suspett f'dana l-kaz, madanakollu dina l-Qorti ma tistax tasal ghal konkluzjoni lil hinn minn dubbju dettat mir-raguni illi fil-fatt l-imputat huwa hati tal-akkuza migjuba kontrieh. [emfazi tal-Qorti]

Whereas reference shall also be made to judgements delivered by the Court of Criminal Appeal, **Il-Pulizija vs Allen Debono** and **Il-Pulizija vs Alessandro Debono**,²⁷ wherein it was decided that a witness, even if by account of his profession and expertise, could only testify on facts personally attested but could not extract from such facts any conclusion or deliver an opinion as to their meaning and purport. In the said cases, the witness was a psychologist, yet the principle enunciated therein

²⁶ Hon. Magistrate Dr Dr Edwina Grima; Dec. 18.03.2010. Vide also a judgement by the same Court as presided, **Il-Pulizija vs Peter Bugeja**, Dec. 13 ta' Jannar 2011 and **Il-Pulizija vs Joseph Camilleri et** Dec. 20.06.2013.

²⁷ **Il-Pulizija vs Allen Debono**, Court of Criminal Appeal, per Hon Madame Justice Dr Edwina Grima, Decided on 26th January 2017; Appeal. No.218/2015. Vide also **Il-Pulizija vs Alessandro Debono** delivered on same date by the said court; Appeal No.219/2015.

finds application to the case under review since at no point in time was an expert appointed to examine the meter and ascertain whether theft of electricity actually occurred by any of the means described in Article 264(2) of the Criminal Code:

Illi meta l-Ewwel Qorti iddikjarat tali prova bhala wahda inammissibbli skont il-ligi hija strahet fuq dak dispost fl-artikolu 650(1) tal-Kap.9. billi tali xhud ma setatx taghti l-fehma taghha fil-kapacita taghha professjonali bhala psikologa jekk din ma tkunx giet innominata mill-Qorti sabieq thejji perizja fuq il-kaz. L-Avukat Generali, izda isostni illi l-ewwel Qorti ma kellhiex tiskarta id-deposizzjoni tax-xhud fit-totalita taghha izda kien ammissibbli dak il-parti tar-rapport kif ukoll tax-xhieda fejn gew deskritti fatti mill-istess xhud bhal per eżempju dak li kienet stqarret maghha l-minuri u allura kienet inammissibbli biss f'dik il-parti fejn hija esprimiet l-parir taghha professjonali.

Issa huwa minnu illi l-artikolu 650 tal-Kap.9, iccitat mill-Ewwel Qorti huwa deroga ghar-regola generali dwar l-ammissibilita ta' xhieda minn esperti *ex parte* li jtkellem dwaru l-artikolu 563A tal-Kapitolu 12 rez applikabli ghad-dritt procedurali penali permezz ta' l-artikolu 520(1)(d) tal-Kodici Kriminali. Dan ghaliex ghalkemm fid-dritt procedurali l-emenda introdotta bl-Att XXIV tal-1995, l-opinjoni ta' espert *ex parte* giet reza ammissibbli u dan diment illi l-qorti tivverifika illi tali xhud ikollu il-kwalifiki mehtiega, tali regola ma sabitx applikazzjoni fil-kamp penali u dan meta l-artikolu 650 jiddisponi espressament, kif gustament irrilevat l-Ewwel Qorti, illi:

“Fil-kazijiet kollha li fihom għall-eżami ta’ persuna jew ta’ haġa tkun tinħtieġ hila jew sengħa speċjali, għandha tiġi ordnata perizja.”

L-Avukat Generali ma jiddibattix dan il-punt ta' dritt, izda jishaq illi f'dik il-parti tar-rapport u xhieda ta' l-espert fejn hija kienet qed taghti rendikont ta' fatti li sehew tali prova kienet wahda ammissibbli u ma kellhiex tigi skartata.

“Illi huwa principju ormai accettat li sakemm l-inkarigu espletat minn tali espert ikun biss kwistjoni ta` kostatazzjoni ta` stat ta` fatt, ir-rapport taghhom f`dak is-sens huwa ammissibbli, bhala prova valida. Huma l-opinjoni u l-konkluzjonijiet komparattivi taghhom li m`ghandhomx valur probatorju. Galadarba l-posizzjoni hija li rapport ta` dawn l-esperti, li jikkontjenu opinjonijiet u rizultanzi ta` xi ezamijiet minnhom mahgmula, huma nulli u bla ebda effett probatorju, taghmel sens li Qorti, anke minn jeddha, minkejja li ma jkunx hemm oggezzjoni ghal dawn l-esperti mid-difiza, tiddecidi billi tiskarta ghal kollox tali opinjonijiet u rapporti.” – Il-Pulizija vs Nazzareno Zarb u Melcior Spiteri deciza App.Inf 16/12/1998.....

Kwindi ghalkemm huwa minnu illi l-espert fir-rapport u anke fix-xhieda taghha tirrakonta dak li tghid il-minuri, madanakollu dan sar permezz ta' metodologija addotata minnha fil-qafas professjonali taghha u kwindi gjaldarba din saret mhux minn espert nominat mill-qorti jew f'xi inkjesta magisterjali, ikun ferm perikoluz illi dan ir-rapport jigi ammissa bhala prova indipendenti fl-atti.....Kwindi din il-Qorti hija tal-istess fehma bhall-Ewwel Qorti illi tali prova ghandha titqies bhala wahda inammissibbli. Dak li kellha taghmel il-Prosekuzzjoni f'dan il-kaz huwa li titlob in-nomina ta' espert speċjalizat...[emfazi ta-l-Qorti]

In another judgement, cited by the learned counsel for the accused, the Court held that the fact that the accused was not the sole person having access to the place wherein the meter was held, was deemed sufficient to

overturn the legal presumption to which the provision of Article 264(2) of the Criminal Code refers:²⁸

Illi gie ippruvat ukoll illi l-meter tad-dawl in kwistjoni jinsab f' post illi huwa facilment accessibbli ghal kull min jidhol fil-blokk ta' appartament in kwistjoni inkluz deliveryman, postman, tal-halib ecc.

Similarly in **Il-Pulizija vs Paul Micallef** the same Court held:²⁹

Illi l-imputata xehdet f'dawn l-atti u qalet illi kien hemm diversi okkazzjonijiet fejn kien inqataghlhom id-dawl fil-flat mikri lilhom. Hija xehdet ukoll illi hemm diversi kawzi pendenti bejnietha u r-ragel taghha u s-Sur Fenech, is-sid tal-flat fejn huma jirrisjedu, u xehdet ukoll illi l-meter tad-dawl in kwistjoni kien f'armarju fil-parti komuni tal-flat isfel, l-armarju jissakkar bic-cavetta u c-cavetta hija imdendla mal-hajt permezz ta' musmar u ghalhekk hija accessibbli ghal kullhadd. Hija cahdet illi qatt baghbset mal-meter tad-dawl in kwistjoni.

Illi l-Qorti tara illi l-imputati imexxielhom jeghlbu l-presunzjoni ill il-Ligi timponi kontra taghhom f'kazijiet simili u dana peress illi l-meter tad-dawl in kwistjoni ma kienx accessibbli ghalihom biss, izda ghal kwalunkwe persuna li setghet facilment taqbad ic-cavetta, tiftah l-armarju fejn kien hemm il-meter tad-dawl in kwistjoni u tbaghbas l-istess meter tad-dawl. Irrizulta wkoll illi l-imputati fuq imsemmija ghandhom diversi problemi u anke kawzi civili pendenti mal-proprietarju tal-fond mikri lilhom.

Ghaldaqstant il-Qorti tara illi l-Prosekuzzjoni ma imexxilhiex tipprova l-akkuzi odjerni kontra l-imputati fuq imsemmija sal-grad rikjest mill-Ligi u ghaldaqstant filwaqt illi qeghda tiddikjara lill-istess imputati mhux hatja ta' l'imputazzjonijiet kollha migjuba kontra taghhom qeghda tilliberahom minn kull imputazzjoni htija u piena.

Having carefully examined the evidence in the light of these judgements, the Court cannot but acquit accused of all the charges brought against him given that the prosecution failed to prove its case beyond a reasonable doubt.

Dr Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law).
Magistrate

²⁸ **Il-Pulizija vs Joseph Gauci**, Court of Magistrates (Malta) as a Court of Criminal Judicature, per Hon. Magistrate Dr. Abigail Lofaro, Decided on 10.01.2002

²⁹ Decided on 19th May, 2004