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

MAGISTRATE DR. MARSE-ANN FARRUGIA LL.D.

Today Wednesday 8th November, 2017

The Police

(Inspector Fabian Fleri)

vs.

Thomas Charles Deamer

The Court,

Having seen the charge brought against the accused:

Thomas Charles Deamer, 55 years old, born on the 25th April 1953 at Chester, England son of Ernest Charles and Mary nee' Hargreaves residing at Hibiscus, Triq il-Qaliet, Marsascala, or The Mariner's, Triq ic-Cervjola, Marsaskala holder of identity card No 333401(L)

Charged with having on the 28th November 2008 and during the past days committed the theft of a mobile phone and a laptop computer from 'The Mariner's', Triq ic-Cervjola, Marsaskala to the detriment of Michele Cordina, which theft is aggravated by person, place and amount, which amount exceeds the sum of 232.93 Euros (LM100) but is less then 1164.69 Euros (LM500).

Having seen the consent of the Attorney General in terms of Article 370(4) of the Criminal Code, for these proceedings to be conducted by summary proceedings, and having seen that the accused had no objection that these proceedings are so conducted and decided.

After having heard the evidence and seen all the records of the case and documents submitted.

After having heard the oral submissions of the parties;

Considered that:

The Facts

Concisely, the facts which gave rise to these criminal proceedings are the following:

1. The accused had been in a relationship with the complainant, Michelle Cordina for 8 years, and they had a five year old daughter. They lived together in Marsascala with the complainant's ten year old son, and her mother-in-law.
2. The accused's son, Nick Deamer had a residence a few meters away from where the accused lived.
3. Nick Deamer gave a Sony Ericson mobile as a present to the complainant, and according to the accused, it was customary that when the complainant started using a new mobile, she would tell him to use her old mobile, and he says this is what happened in this case. According to the accused, when she received the Sony Ericson mobile, the complainant told him, he could start using her old Nokia model.
4. The accused had also bought the complainant a laptop as a present.
5. The accused said that one day, he decided to start using the old Nokia model, and he discovered some pornographic pictures on it, which shocked him and he left the mobile in his son's residence, so the children don't get hold of it.
6. Some days later, a woman, who said she was an ex partner of the complainant phoned him, and told him that the complainant was having an affair with another woman, and there may be pornographic pictures on the complainant's laptop.

7. Since the complainant's laptop, together with the other computers in the house, were accessible to the children, the accused decided to hide the laptop and have the contents of the hard drive analysed.
8. The accused hid the laptop in the engine compartment of an unused van which was in the basement of the house where they lived, and he left a note to the complainant with the following words: *"The laptop I got for your birthday I have borrowed to have the hard drive copied. You can have it back as soon as I have had it done. Of course any problems or damage to the machine I will replace with a brand new one.".*
9. When the complainant found this note, she went to the Police station to report that the accused had stole her laptop.
10. The accused was called to the Police station and he showed the Police where he hid the laptop, and also told them he had taken the mobile and where he hid it, and gave them to the Police.

Considerations on Guilt

Before considering the merits, the Court needs to consider some preliminary issues.

Withdrawal of the Complaint

In the sitting of the 7th May 2012, the legal counsel of the complainant declared that the complainant is no longer interested in this case and is renouncing to her complaint.

A public deed dated 9th December 2010 was also exhibited, wherein the complainant *"obliged herself to withdraw and cede any criminal proceedings and/or complaint she has filed against the father* (the accused) *and this as much as it is legally possible to do so."*

The charge against the accused is of aggravated theft. This offence impinges on public order, and hence the Police do not require the complaint of the injured party to institute criminal proceedings. If there is a formal complaint, and it is withdrawn at any stage of the criminal proceedings, as happened in this case, this can have no bearing on the continuation of these proceedings, which cannot be withdrawn by the complainant, because the proceedings were instituted *ex officio* by the Police.

Hence, the Court can take no cognisance of the withdrawal of the complaint, except if need be, in considering the punishment to be established.

The Admissibility of the Statement of the Accused

The Court notes that the defence raised no issue on the admissibility of the statement given by the accused to the Police, even though this statement was given at a time when Maltese law did not allow the suspect to be assisted by a lawyer prior to the Police interrogation. The accused gave evidence in Court and he did not try in any way to retract his statement – rather he repeated what he had stated in the statement. In these circumstances, the Court is of the opinion that the *dicta* of the European Court of Human Rights in the Case **Borg vs Malta** decided on the 12th January 2016, are not applicable to this case.

The Merits

The Court will start from the charge of the mobile phone. The evidence of the accused that he took the mobile phone, because the complainant got a new mobile phone as a present, and it was normal practice for him to take the old mobile, when she got a new one, was not contradicted by anyone. In fact, when giving evidence, the complainant herself admitted, she had not even noticed, that the accused had taken the mobile phone.

It is not unheard of, that old mobile phones which are still usable, are given to another member of the family, especially if he is not keen in the latest technology, and the accused admits he is not so technology savvy.

Although, as the Prosecuting Officer pointed out, the accused brought forward no evidence to prove his allegation that there were pornographic photos on the mobile, the fact that the Cybercrime Unit found seven pornographic movies on the laptop, gives credibility to his evidence. The Court finds that on a balance of probabilities, he has succeeded to prove that he hid the mobile in his son's residence, to ensure that it does not come in the hands of the children, one of whom, being ten years old, was for sure technology savvy, and although the

other one was only five years old, the Court cannot exclude on a basis of probability that with mobiles being the order of the day – and there where at least 5 other mobiles in the house – she was technology savvy as well.

In any case, the defence managed to prove that on a basis of probabilities, the complainant had given him the mobile, since she no longer needed it, and hence the charge of theft can never be proved, since the requisite of *dolo* – maliciousness – which is required by the authors and jurisprudence, has not been proved by the Prosecution.

As regards the laptop, the accused also says that he did not take it for personal gain, but to make sure the children don't use it, and to prevent access to any pornographic material in it.

Hence, the issue whether the accused is guilty of the charge of the theft of the laptop revolves round the issue whether all the elements of the crime of theft as defined by the authors and the jurisprudence, or whether the facts of the case fall within the parameters of the crime of *ragion fattasi* - the exercise of a pretended right – as submitted by the accused defence counsel during the oral submissions.

From the evidence, there is no doubt that the four other elements of the crime of theft, and precisely those of the *"contractatio dolosa di cosa altrui, fatta invito domino",* which form part of the classic definition of **Carrara**[1], which has consistently been adopted by our Courts.[2] But the accused is contesting precisely the fifth requisite, and precisely what **Carrara** identifies as *"l'animo di farne lucro"* or *"animus lucrandi".*

In the judgement **Il-Pulizija vs. John Galea et** deciza fit-30 ta' Jannar 2003, the Court of Criminal Appeal (in its Inferior Jurisdiction)[3] held as follows:

"Issa kif gie dejjem ritenut mill-Qrati Taghna l-intenzjoni li taghmel xi qliegh tikkostitwixxi l-intenzjoni specifika tar-reat tas-serq. L-element intenzjonali ta' dan ir-reat ma jikkonsistix biss fl-intenzjoni li wiehed jiehu l-oggett , imma ukoll li dan isir bl-intenzjoni li jsir xi qliegh. Kif jghid il-CARRARA [op.cit. Vol. IV , para. 2035]:-

[1] **Programma**, **Parte Speciale**, Vol. IV, para 2017.
[2] See for example **Il-Pulizija vs. Mario Tanti et** decided by the Court of Criminal Appeal on the 9th December 1944, **Il-Pulizija vs. Carmelo Felice** decided by the Court of Criminal Appeal on the 10th January 1942.
[3] *Per* Judge Joseph Galea Debono.

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

u l-CRIVELLARI jghid :-
"L'elemento intenzionale nel furto non si costruisce gia' col solo animo di prendere ma coll'animo di lucrare.

Il-Professur Sir Anthony Mamo [Notes on Criminal Law, 1958 , Vol. II , p. 305] jispjega hekk:-
"The special malice of theft consists in the intent to procure a benefit or satisfaction whatever from the thing belonging to others (lucri causa). Thus "lucrum" in this connection does not mean an actual gain or profit in terms of money but any advantage or satisfaction procured to one's self… …"

u l-MAINO fil-"Commento al Codice Penale" Libro II, Titolo X , para. 1843 jghid:-
"il profitto … … deve intendersi cosi' nel senso di lucro potenziale e possibile e di lucro non soltanto materiale , ma nell'ampio senso della parola."
u aktar ' isfel :-
"… … per lucro o profitto nel furto si intende non soltanto il lucro borsuale che puo ritrarsi dalla cosa rubata vendendola, oppure un effettivo aumento del patrimonio del ladro, ma qualunque godimento o piacere, qualunque sodisfazione procurata a se stesso."

Imbaghad il-CASSAZIONE ta' Ruma ukoll irriteniet li:-
"Per lucro va inteso qualsiasi vantaggio illecito che si tragga o si proponga di trarre materialmente dalla cosa rubata." [21, Novembre , 1916 - Bollett Pen. 1917, p..140]

Il-Professur Mamo izid jelabora [op.cit.]
"..it suffices that the purpose of deriving a gain in the above sense existed in the intention of the agent; it is not required for the completion of the crime that such gain shall have in fact been realised … … Indeed even where the gain has failed to be realised by reason of a voluntary act of the thief himself (e.g. because he restores the thing) … … the crime of theft juridically continues to subsist, inasmuch as the "animus lucrandi" was present at the time of

appropriating the thing. Restitution of the thing or compensation operates only in mitigation of punishment in certain cases."

Pero l-istess awtur ikompli jghid (op. cit. p. 306) li:-
"The "animus lucrandi" is also negatived if the thing is taken and carried away in the exercise of a pretended right, in which case you may have in appropriate circumstances, the offence under section 84 (illum Section 85) of the Criminal Code."

L-istess jghid MAINO [op.cit. para 1844]:-
"Se la sottrazione della cosa altrui e' commessa o per pagarsi di un credito, o per compensarsi di un danno , o per esercitare sulla cosa un diritto ancorche' controverso,
esula dal fatto, per comune consenso degli scrittori e pel concetto dell'articolo in esame, l'imputabilita' a titolo di furto."
u
"Ricorrendo gli altri estremi voluti dall'art 235 cod. pen., non sara' dunque applicabile il titolo di furto, ma quallo di ragion fattasi a chi prenda una cosa del suo debitore per rivalersi o garantirsi del suo credito a chi sottragga una cosa litigiosa nella credenza di avervi diritto; e cio' perche' in tali casi la coscienza del diritto esclude il dolo del furto, sostituendo al proposito di procurarsi un illecito profitto (n.1843) quello di evitarsi un danno."

Il-CARRARA (op. cit. Vol.IV , para. 2036) ukoll jghid li :-
"Si esclude in colui che credeva di aver ragione sopra la cosa o intendeva a ricattare un suo credito: il quale si rendera' responsabile di ragion fattasi ma non di furto."
u fl-annotazzjoni tal-istess paragrafu , dan il-gurista ikompli jelabora dwar din id-distinzjoni bejn ir-reat ta' serq u dak ta' ragion fattasi . Hekk jghid:-
"La eliminazione del furto per la sua conversione nel titolo di ragion fattasi ha una frequente applicazione ... ... La vidi applicare ad un marito che avendo sorpreso la moglie in adulterio, aveva tolto al drudo l'orologio per ricattarsi. La vidi applicare ad una domestica che sedotta dal proprio padrone, era fuggita dalla sua casa asportando oggetti di valore per supplire alle spese del suo parto. Queste ed altre simili sono conseguenze del principio che al furto richiede il fine della locupletazione e sono conseguenze logiche quando siano rettamente applicate alle contingenze dei fatti. ... ... il vero fondamento della degenerazione del furto in ragion fattasi sta nella mancanza nell'animo di arricchirsi."

Imbaghad izid jghid li r-raguni ghal din id-distinzjoni hija wahda:
"eminentemente giuridica, cosi' nel rapporto soggettivo, perche' vi e' minore malvagita'; come nel rapporto oggettivo, perche' chi al fine di pagarsi invola un oggetto al suo debitore non reca spavento ad alcuno tranne ai debitori di mala fede, ai quali deve la societa' una protezione minore. La teorica dominante in Italia e' dunque giustissima sotto tutti gli aspetti."

Illi imbaghad, kif gie ritenut minn din il-Qorti, l-elementi kostituttivi tar-reat ta' ragjon fattasi kontemplat fl-artikolu 85 tal-Kap.9 huma erbgha u cioe':-
a) att estrem li jispolja lil xi hadd minn xi haga li jkun qed igawdi, liema att ikun esegwit kontra l-oppozizzjoni, espressa jew prezunta ta' dan il-haddiehor;
b) il-kredenza li l-att qed isir b'ezercizzju ta' dritt;
c) il-koxjenzja fl-agent li hu qed jaghmel "di proprio braccio" dak li jmissu jsir permezz tal-awtorita' pubblika; u
d) in-nuqqas ta' titolu li jirrendi l-fatt aktar gravi.
(ara Appelli Kriminali: "Pulizija vs. Carmel sive Charles Farrugia", 17.2.1995; Pulizija vs. Rene' Micallef 6.6.1995, Pulizija vs. Mark John Schembri, 18.9.2002 u ohrajn.)"

Considering the evidence brought forward by both parties, in particular the note which the accused left to the complainant when he took the laptop, wherein he made it clear that he had *"borrowed"* the laptop to copy the hard disk, and he was going to return it after doing so, and if the laptop sustained any damage he would make good for it, the Court is morally convinced that, at least on a balance of probabilities, the action of the accused in taking the laptop was in the exercise of a pretended right.

It is true that from the evidence, it results that the laptop was password protected, but as already said, the accused is not technology savvy, and in fact he did not intend to examine the laptop himself. What he took is the decision to hide the laptop, in order to ensure that there was no pornographic material in it – which from the evidence it resulted it had – in order to protect the children, and also, the Court is convinced, to confirm himself that whether there was pornographic material in it or not. But the accused never had the intention to keep the laptop.

Hence, in the Court's opinion, in this case, there is lacking the important element of *animus lucrandi* or *animo di farne lucro,* and this element is a requisite for the crime of theft to subsist.

Although, it seems that the crime with which the accused should have been charged, and found guilty of, should have been that contemplated in Article 85 of the Criminal Code, this Court, however, cannot find him guilty of it, since it is not a crime included and involved in the crime of theft, which is a totally different crime, under a separate title of the Criminal Code.

Conclusion

In view of the above considerations, the Court finds the accused not guilty of the crime with which he has been charged, and is acquitting him of the said charge.

Magistrate

Robert Bugeja
Deputy Registrar