



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

**Magistrate Dr. Joseph Mifsud LL.D.**

**The Police  
(Assistant Commissioner Ian J. Abdilla)**

**vs**

**Donald Micallef  
Celine Lee Bentley**

**Case number 1434 / 2011**

**Today 30th January 2018**

The Court,

Having seen the charges against Donald Micallef holder of Maltese Identity Card number 207082 (M) and Celine Lee Bentley holder of Maltese Identity Card number 57584 (A), charged with having in February 2011 and in the preceding months, in these islands, by means of several provision of the Law and which were committed in pursuance of the same design, personally and/or in their capacity as director or official of the company Market Handle Limited (reg. No. C 49546)

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 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 a gain of more than two thousand, three hundred and twenty nine Euro and thirty seven cents (€2,329.37) to the detriment of John Borg and Rita Borg;

2. Furthermore, with having, on the same dates, localities, and circumstances, misapplied, converting to their own or to the benefit of any other person, the sum of more than two thousand, three hundred and twenty nine Euro and thirty seven cents (€2,329.37) to the detriment of John Borg and Rita Borg, which sum has been entrusted or delivered to them under a title which implies an obligation to return such thing or to make use thereof for a specific purpose, and which sum has been entrusted or delivered to them by reason of their profession, trade, business, management, office or service.

The Court was hereby kindly requested that in case of a finding of guilt of the accused, apart from inflicting the punishment prescribed at Law, also orders the forfeiture of all the objects exhibited in these proceedings.

The Court was also kindly requested that, in pronouncing judgment or in any subsequent order, sentence the person/s convicted, jointly or severally, 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 that this case was assigned to this Court as presided by means of a decree dated 30 June 2015 delivered by the Honorable Chief Justice;

Having seen all the acts and records of the proceedings;

Having seen final written submissions;

**Having considered:**

### **Legal Considerations Regarding the Level of Proof Required**

That the Prosecution is bound to bring forward evidence so that the Court can find the accused guilty as charged. Manzini<sup>1</sup> notes the following:

*“Il così detto onero della prova, cioè il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit”.*

In the Criminal field the burden of the Prosecution is to prove the charges beyond reasonable doubt. With regards to the defence, enhanced by the presumption of innocence, the defence can base or prove its case even on a balance of probabilities meaning that one has to take into consideration the probability of that version accounted by the accused as corroborated by any circumstances. This means that the Prosecution has the duty to prove the tort attributable to the accused beyond every reasonable doubt and in the case that the Prosecution being considered as not proving the element of tort the Court has a duty to acquit the accused.

That the following principles, as clearly outlined by the Constitutional Court in its judgment of the 1<sup>st</sup>. of April 2005 in the case **The Republic of Malta vs. Gregory Robert Eyre et**, must be applied:

*“(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the Prosecution,*

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<sup>1</sup> Diritto Penale (Vol. III, Chapter IV, page 234, Edition 1890).

*to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence."*

That Lord Denning in the case **Miller vs. Minister of Pension** explained what constitutes "*proof beyond a reasonable doubt*".

He stated:

*"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing shall of that will suffice".*

## **The facts:**

These proceedings were instigated by means of a complaint made by John Borg on the 15<sup>th</sup> December, 2011, a copy of which is found at fol. 34 of the records of the case. A subsequent letter sent on behalf of the complainant John Borg and his wife Rita Borg dated 2<sup>nd</sup> January, 2011, a copy of which is found at fol. 35 of the records of the case was also sent to the Economic Crimes Unit. The allegation in the said criminal complaint is that accused Donald Micallef and Celine Lee Bentley used misleading words to persuade the complainants John and Rita Borg to loan to the accused the sum of thirty thousand and five hundred Euro (€30,500). It was further alleged in the said criminal complaint that the accused told the complainants that they needed the said loan for only a period of two weeks and in order to obtain a further loan from the bank.

At folio 53 of the Acts, John Borg during his testimony said:

*“Pros: U ghaliex riedhom? Spjegalna Daqsxejn.*

*Xhud: Riedhom biex jiehu loan bill-Bank. Qalli dawn qalli naghtik elfejn u hames mijja Maltin taghhom. Qalli zmien gimghatejn tlieta, dawn ikunu ghandek bla paroli.*

*Pros: U riedhom biex jiehu loan igifieri kien ser izommom garanzija li fhimt int jew biex ihallas loan iehor? Ghalxiex ried il-flus tieghek biex jiehu loan mill-Bank?*

*Xhud: Jghamilhom Garanzija l-Bank biex jiehu loan fuqhom”*

Donald Micallef had promised the complainants that after 3 weeks the bank would have issued all the loans and thus the monies handed out, that is the 25,000 would be returned back to complainants together with an additional sum of 2,500 Maltese Liri, as a bona gratia payment for the deed done on behalf of the complainants.

All evidence put forward by the Prosecution points out that there was never any intention on behalf of the accused to take out a loan, and neither did they use the money to inject capital in the Company, Market Handle Limited, as had been promised by them to the complainants.

The only loan and bank facility afforded to the company in question, Market Handle Limited was dated the day of the 20<sup>th</sup> of July 2010, and thus preceded the con-play towards complainants by 2 months. <sup>2</sup>

Christine Farrugia testified as a representative of Banif Bank on the 18<sup>th</sup> of June 2012, and said the following regarding any loans taken out by accused or the Company owned by Celine Lee Bentley:

*“Witness: To identify any credit facilities that were provided to Donald Micallef and Celine Lee Bentley and Market Handle Limited.*

*Pros: Are you in a position to give us this information yet?*

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<sup>2</sup> Vide Loan Agreement a folio 79 et sequitur

*Witness: Yes, With regard to the facilities that were given to Market Handle Limited these amount to 50,000 euros. A business loan amounting to 25,000 euros and a business overdraft amounting to 25,000 euros.*

*Pros: And when was this dated?*

*This was dated, the agreement, on the 20<sup>th</sup> day of July 2010.*

*Witness: As regards to Donald Micallef no facilities were given. The facilities were only given in the name of Market Handle Limited”*

### **Considers:**

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

### **In regards of Celine Lee Bentley**

From a reading of the acts it seems that Celine Lee Bentley was not involved in the negotiations or meetings leading to the loan agreement.

Celine Lee Bentley not only was she never involved in any transactions whatsoever but indeed she did not deal or negotiate with the complainants. In fact, complainant John Borg could not even communicate with her as he has no knowledge of the English language. This was established as from the very beginning of the court case and results clearly from the acts of the case at fol. 10 where it is stated thus:

*L-imputata Celine Bentley infurmat lill-Qorti li hi m'għandhiex konnoxxenza tal-lingwa Maltija iżda tifhem b'dik Ingliża, [...] il-Qorti [...] tordna li l-proċeduri jitkoplew bil-lingwa Ingliża. [...]*

*There appeared John Borg who informed the Court that he is not ready to testify in the English language [...] John Borg gave evidence on oath in the Maltese language [...] Rita Borg gave evidence on oath in the Maltese language.*

The parte civile failed to prove that Celine Lee Bentley was in any way involved in creating any *mise-en-scene*. Celine Lee Bentley never communicated with the complainants in question to obtain the loan forming the subject matter of this court case.

The complainant John Borg only refers to the other co-accused, Donald Micallef in his testimony. At fol. 50 et seq. of the records of the proceedings he states the following:

*Pros: Kif tafhom jekk jgħoġbok?*

[...]

*Xhud: Mela għandi ħabib tiegħi [...] Qalli hawn **wieħed** trid tisilfu l-flus?  
[...] Qalli ħa **kelmu**. Ltqajna Birkirkara fejn il-Eurosport.*

[...]

*Pros: Xi spjegalek Donald Micallef? Sa dak iż-żmien lil Celine Lee Bentley ma kontx tafha.*



*Xhud: Le qas lilu.*

*Pros: Ma kinitx prezenti għal dan l-ewwel meetings?*

*Xhud: Le le. **Hu** biss kien hemm.*

This is furthermore confirmed throughout the testimony of the parte civile John Borg, as he only makes reference to co-accused Donald Micallef and never to Celine Lee Bentley. He makes use of words such as *Qalli dawn tini 25000... u fi zmien gimghatejn tlieta naghtihomlok ghax ser niehu loan mil-Bank fuqhom dawn*. Complainant John Borg continues to testify at fol. 53 of the records of the case as follows: *Riedhom biex jiehu loan mil-Bank. Qalli dawn se naghtik elfejn u hames mija Maltin. Qalli zmien gimghatejn tlieta. Jaghmilhom garanzija l-Bank biex jiehu loan fuqhom. Accettajt qalli issa mmorru ghand in-Nutar*.

Complainant John Borg confirms that he met Celine Lee Bentley for the first time on that same day that the loan agreement by means of a private writing was signed in front of Notary Charles Mangion. Thus the prosecution not only failed to prove the involvement of Celine Lee Bentley but failed to prove the material element of the crime of fraud in general. If anything the prosecution proved that Celine Lee Bentley could not have defrauded the parte civile as she was not involved – in any way whatsoever – in obtaining the money from the parte civile. Indeed, at fol. 54 of the records of the proceedings it was affirmed that:

*Pros: Sewwa. Igifieri dakinhar li ltqajtu għand in-Nutar min kontu jekk jgħoġbok?*

*Xhud: Jien, il-Mara, Celine u Donald.*

***Pros: U hemmhekk l-ewwel darba li ltqajt ma` Celine.***

***Xhud: L-ewwel darba.***

*Pros: Kif giet introdotta miegħek Celine?*

*Xhud: Jien bl-Ingliż ma nafx pero` hi tgħid li hi d-Direttur tal-Kumpanija u dak l-dak tagħha, L-partner jew x`jigi. Ma nafx.*

***Pros: Igifieri int ma kellimtiex lil Celine peress li ma tafx bl-Ingliż.***

***Xhud: Le jien ma nafx nitkellem bl-Ingliż. Pero` iffirmaw it-tnejn li huma.***

During the deposition of Inspector Ivan Cilia during the sitting of the 7<sup>th</sup> May, 2012, he confirms at page 23 of the records of the case with reference to Celine Lee Bentley that: *She said she did not give any reason of this loan since the negotiations were done solely by Donald Micallef.* Having thus shown that Celine Lee Bentley was not involved in the obtaining of the loan from the parte civile.

The Court is acquitting Celine Lee Bentley from the charges she is accused with.

## In regards of Donald Micallef

### Elements of the crime of fraud

The elements of the crime of fraud were illustrated in the judgment given by the Court of Magistrates (Gozo) as a Court of Criminal Judicature on the 21<sup>st</sup> July, 2016 in the names **Il-Pulizija v. Victor Camilleri** wherein the following exhaustive exposition of the elements of the said crime was made:

*Artikolu 308 jitratta frodi b'ghemil qarrieqi.*

*Illi biex jissussisti ir-reat tal-frodi jew truffa gie ritenut kostantement fil-gurisprudenza u fis-sentenzi tal-Qrati taghna illi jridu jikkonkorru diversi elementi. Ibda biex irid ikun hemm ness bejn is-suggett attiv u s-suggett passiv tar-reat u cioé bejn min qieghed jikkommetti r-reat u l-vittma. Hemm imbaghad l-element materjali ta' dana r-reat u cioé l-uzu ta' ingann jew raggieri li jwasslu lill-vittma sabiex isofri it-telf patrimonjali. Finalment huwa necessarju li jkun hemm l-element formali tar-reat konsistenti fid-dolo jew fl-intenzjoni tat-truffatur jew frodatur li jinganna u dana sabiex jikseb profitt jew vantagg ghalih innifsu. Jekk xi wiehed jew iktar minn dawn l-elementi huma nieqsa, allura r-reat tat-truffa ma jistax jissussisti.*

*Illi f' sentenza fl-ismijiet **Il-Pulizija vs. Charles Zarb** moghtija fit-22 ta' Frar 1993, il-Qorti tal-Appelli Kriminali ghamlet esposizzjoni ferm preciza, studjata u dettaljata ghar-rigward tal-elementi ta' dana r-reat. Il-Qorti bdiet sabiex esprimiet ruhha b'dan il-mod ghar-rigward ta' dana r-reat:*

*"Id-delitt tat-truffa huwa l-iprem fost il-kwalitajiet ta' serq inpropriji u hu dak li fl-iskola u fil-legislazzjoni Rumana kien maghruf bhala steljolat u li jikkorrispondi ezattament ghat-truffa tal-Codice Sardo, ghal frodi tal-Kodici Toskan, ghal Engano jew Estafa fil-kodici Spanjol, ghal Bulra f'dak Portugiz, u ghal Esroquerie fil-Kodici Franciz. [...]*

*Id-disposizzjonijiet tal-Kodici taghna kienu gew mehuda minn Sir Adriano Dingli mill-paragrafu 5 tal-artikolu 430 tal-Kodici delle Due Sicilie li hu identiku hlief ghal xi kelmiet insinjifikanti ghal Kodici Franciz (artikolu 405) avolja dan, il-Kodici delle Due Sicile, it-truffa kien sejhilha Frodi [...].*

*Skont guriprudenza kostanti, l-ingredjenti tal-element materjali ta' dan id-delitt ta' truffa, huma dawn li gejjin.*

*Fl-ewwel lok bhala suggett attiv ta' dan id-delitt jista' ikun kulhadd.*

*Fit-tieni lok il-Legislatur, aktar mill-interess soċjali tal-fiducja reciproka fir-rapport patrimonjali individwali, hawn qed jittutela l-interess pubbliku li jimpedixxi l-uzu tal-ingann u tar-raggieri li jinducu bniedem jiddisponi minn gid li fil-kors normali tan-negozju ma kienx jagħmel.*

*Fit-tielet lok hemm l-element materjali tat-truffa u jikkommetti d-delitt tat-truffa kull min:*

- a) b'mezzi kontra l-ligi, jew*
- b) billi jagħmel uzu minn ismijiet foloz jew*
- c) ta' kwalifiki foloz jew*
- d) billi jinqeda b'qerq iehor u*
- e) ingann jew*
- f) billi juri haga b'ohra sabiex igieghel titwemmen l-ezistenza ta' intraprizi foloz,*
- g) jew ta' hila;*
- h) setgha fuq haddiehor jew*
- i) ta' krediti immaginarji jew*
- j) sabiex iqanqal tama jew biza dwar xi grajja kimerika, jagħmel qliegh bi hsara ta' haddiehor.*

[...] Hu necessarju biex ikun hemm ir-reat ta' truffa, li l-manuori jridu jkunu ta' natura li jimpressjonaw bniedem ta' prudenza u sagacja ordinarja, li jridu jkunu frawdolenti u li hu necessarju li jkunu impjegati biex jipperswadu bl-assistenza ta' fatti li qajmu sentimenti kif hemm indikat fil-ligi. [...]

Dwar l-artifizzi intqal mill-Qorti illi "hemm bzonn biex ikun reat taht l-artikolu 308 illi l-kliem ikun akkumpanjat minn apparat estern li jsahhah il-kelma stess fil-menti tal-iffrodat. Din it-tezi hija dik accettata fil-gurisprudenza ta' din il-Qorti anke kollegjalment komposta fil-kawza "Reg vs. Francesco Cachia e Charles Bech (03.01.1896 – Kollez.XV.350) li fiha intqal illi "quell' articolo non richiede solamente una asserzione menzoniera e falza, ma richiede inoltre che siano state impiegate, inganno, raggiro o simulazione, ed e' necessario quindi che la falza asseriva sia accompagnata da qualche atto diretto a darla fede"".

Illi fid-decizjoni fl-ismijiet **Il-Pulizija vs. Charles Zarb** kwotata hawn fuq, il-Qorti tal-Appell Kriminali ccitat lill-Imhalled Guze Flores fejn qal illi:

*“kif jidher mid-dicitura partikolari deskrittiva adoperata, hemm bżonn li tirrizulta materjalita’ specifika li sservi ta’ supstrat għall-verosimiljanza tal-falsita’ prospettata bhala vera u b’hekk bhala mezz ta’ qerq. Mhuwiex bizzjejjed għal finijiet ta’ dak l-artikolu affermazzjonijiet, luzingi, promessi, minghajr l-uzu ta’ apparat estern li jirrivesti bi kredibilita’ l-affermazzjonijiet menzjonjieri tal-frodatur. Il-ligi tagħti protezzjoni speċjali kontra l-ingann li jkun jirrivesti dik il-forma tipika, kwazi teġtrali, li tissupera il-kawtela ordinarja kontra s-sempliċi u luzingi, u li tagħti li daww l-esterjorita’ ta’ verita’ kif tirrendi l-idea l-espressjoni felici fid-dritt Franciż mise-en-scene”.*

*L-istess Imhalled Flores kompli jgħid li:*

*“....Kwantu jirrigwarda l-element formali, cioè kwantu jirrigwarda d-dolo ta’ dan ir-reat ta’ truffa, jingħad illi jrid jkun hemm qabel xejn l-intenzjoni tal-frodatur li jipprokura b’ingann l-konsenja tal-flus jew oggett li jkun fi profit ingust tiegħu. L-ingustizzja tal-profitt toħrog mill-Artikolu 308 tal-Kodici Kriminali fejn il-kliem “bi ħsara ta’ haddieħor” ma jħallux dubju dwar dan. Jigifieri biex ikun hemm l-element intenzjonali tar-reat ta’ truffa, hemm bżonn li s-suggett attiv tar-reat fil-mument tal-konsumazzjoni tiegħu ikun konxju tal-ingustizzja tal-profitt u b’dan il-mod il-legittima produttività tal-profitt hija bizzjejjed biex teskludi d-dolo.”*

*Illi minn dina l-esposizzjoni maghmula mill-Qorti tal-Appell li ccittat diversi sentenzi ohra tal-Qrati taghna jidher illi l-elementi rikjesti sabiex jissussisti ir-reat tal-frodi baqghu invarjati fiz-zmien.*

*Illi f'sentenza moghtija mill-Corte di Cassazione Penale gie deciz illi element ewlieni fir-reat tal-frodi huwa "l'elemento del danno patrimoniale". Biex imbaghad jissussisti dana t-tip ta' reat huwa necessarju illi jezistu "I tre momenti di cui si compone il reato e' cioé la produzione dell'artificio, nella successive induzione in errore e nella consequenziale produzione dell'ingiusto profitto per l'agente" (Cassazione Penale Sez. II 3 Ottobre 2006 n. 34179).*

*Illi, ghar-rigward ta' dana l-element soggettiv tar-reat tat-truffa, kif gie ritenut mill-awtur Francesco Antolisei, ikkwotat f'sentenza ohra moghtija mill-Qorti tal-Appell Kriminali, cioé **Il-Pulizija vs. Patrick Spiteri**, deciza fit-22 ta' Ottubru 2004:*

*"L'agente [...] deve volere non solo la sua azione, ma anche l'inganno della vittima, come conseguenza dell'azione stessa, la disposizione patrimoniale, come conseguenza dell'inganno e, infine, la realizzazione di quel profitto che costituisce l'ultima fase del processo esecutivo del delitto. Naturalmente occorre che la volontà sia accompagnata dalla consapevolezza del carattere frodatorio del mezzo usato, dell'ingiustizia del profitto avuto in mira e del danno che ne deriva all'ingannato."*



As emphasized in the judgment delivered by the Court of (Magistrates) as A Court of Criminal Judicature on the 11<sup>th</sup> August, 2016 in the names **Il-Pulizija v. Walter Zammit et:**

*Kif ritenut mill-Qorti tal-Appell Kriminali fis-sentenza tagħha tat-12 ta` Frar, 1999 fl-ismijiet Il-Pulizija v. Anthony Francis Willoughby li:*

*“Fil-ligi tagħna 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 tagħmel jew tonqos milli tagħmel xi haga li ggibilha telf patrimonjali bil-konsegwenti qligh għall-agent (Il-Pulzija v. Emmanuele Ellul, App. Krim., 20/6/97; ara wkoll Il-Pulizija v. Daneil Frendo, App. Krim., 25/3/94*

As it has been clearly stated in the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 2<sup>nd</sup> December, 2014 in the names **Il-Pulizija v. Herman Mizzi et:**

*F`kawża bħal din, wieħed irid joqgħod attent illi jistabilixxa b`certa preċiżjoni l-linja ta` demarkazzjoni bejn każijiet li huma strettament ta` natura ċivili bħal ma` din il-Qorti taħseb li huwa dan il-każ, minn każijiet oħra li huma ta` natura kriminali u li għalihom jirreferi l-Artikolu 308.*

Therefore, for the crime of fraud to subsist, it is necessary to prove beyond reasonable doubt the use of any fictitious name, or the assumption of any false designation or the employment of any other words, in other words the *mise-en-scene*.

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 insisting that the amount allegedly taken, or more precisely given to him, by the injured party was a loan.

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.

It has, on the other hand, the classical ingredients of the crime of misappropriation.

### **Elements of the crime of misappropriation**

The second charge proffered against Donald Micallef is that of the crime of misappropriation.

In relation to misappropriation the Court refers to what was said by the Court of Criminal Appeal in a judgement delivered on the 9<sup>th</sup> 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 r-reat irid ikollu l-intenzjoni specifika illi l-oggett li jigi fdat lilu u li jkun qed jippossjedi ghal ghan specifiku, jigi mdawwar minnu bi profitt ghalih jew ghal haddiehor daqs li kieku huwa kien il-proprietarju tal-istess oggett.

Illi kif jispjega 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 14<sup>th</sup> 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 specificat. F'kull kaz, fl-indagini dwar il-htija jew le ta' approprjazzjoni indebita, ghandha ssir prova ta' l-uzu tal-haga specificata mill-konsenjatur u provata' jekk l-agent ma ikunx ghamel mill-haga dak l-uzu jew uzu divers."

Illi dwar id-dolo mehtieg ghal kummissjoni ta' dana r-reat il-Qorti taghmel pjena referenza ghas-sentenza **Il-Pulizija v Dr. Seigfried Borg Cole** deciza mill-Qorti tal-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 deviazioni 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 12<sup>th</sup> 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 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).”

The evidence shows that the injured party had effectively transferred to accused’s bank account an amount of €30,500.

Thus all the elements of misappropriation subsist, since the accused had upon depositing the sums of money in a separate account, on that faithful day at the Banif Bank, Pavi Supermarket Branch, used the sums of money given by the complainants for their personal use rather than to take out a loan through the same Bank.

Furthermore, neither did the accused use the money to pay off employees of the Company who allegedly were threatening to leave and resign their place of employment. Since only some days after the money was taken away from the complainants with the premise that a capital injection was to be made in the Company, all employees left and the Company failed horribly and never restarted its business.

From bank statements produced and inserted in these proceedings, there is ample proof that attests to the fact that the injured party effectively transferred the money into accused's bank account. The accused's bank statements subsequently attest to how the money was piecemeal withdrawn by the accused.

This documentary evidence by itself brings to nought accused's assertion that the money was given to him as a loan. In alleging accused had to prove it albeit on a basis of probability. In the Court's view accused has not done so. He has offered not a minimal of proof that he ever had such monies and neither his bank statements remotely give credence to this.



The evidence brought forward by the prosecution is overwhelmingly against the accused. After having considered all evidence, including accused's deposition, the Court is left with not the slightest doubt as to his guilt.

**The Court;**

Consequently declares Donald Micallef guilty on the second charge.

Having seen Article 293, 294, 310 (b) of Chapter 9 condemns him to a period of two years imprisonment;

Acquits him of the first charge.

Furthermore the Court orders the accused to effect payment in the amount of twenty five thousand Euro (€25,000) within six (6) month from today to the injured party, in accordance with the provisions of Article 24 Chapter 446 of the Law of Malta.

Regarding co-accused Celine Bentley, the Court declares her not guilty of both charges and acquits her.

**Dr. Joseph Mifsud**

**Magistrate**