COURT OF CRIMINAL APPEAL

JUDGE

The Hon. Dr. Antonio Mizzi LL.D., Mag. Juris (Eu Law)

Appeal no. 351/2014

The Police
Vs

Ilija Rnjak

holder of identity card number 32714 (A)

Today 9th October, 2018.

The Court,

Having seen the charges brought against the appellant Ilija Rnjak before the Court of Magistrates (Malta):

(1) For having In St Julians between the 30th April 2000 and the 30th April 2005, with several acts committed at different times which constitute violations of the same provision of the Law, and committed in pursuance of the same design, being the person occupying of having the control of the tenement of the place styled as *Lorenzo Restaurant*, St Joseph Street, St Julians, with artificial means capable of effecting the unlawful use or consumption of electric current, or prevented or altered the measurement or registration on the meter of the quantity used or consumed at the mentioned premises, committed the theft of electric current to the value of more than two thousand three hundred thirty euro [€2330] equivalent to one thousand

Maltese liri [LM1000], to the detriment of the Enemalta Corporation, which theft is aggravated by 'means', 'time' and 'value';

(2) And furthermore, with having during the same date, period, time and place, voluntarily damaged or broke any part of any energy meter, or the seals thereof or any part of any apparatus or cables used for the supply of electricity, or the seals thereof, to the detriment of Enemalta Corporation;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 21st August, 2014, by which, the Court after having seen Articles 18, 216, 263, 267, 270 of Chapter 9 of the Laws of Malta.

Acquits him from the charge of voluntary damage as this has not been sufficiently proven, that is the Prosecution did not proof beyond reasonable doubt that it was actually accused who damaged the meter.

Considers as regards the penalty to be inflicted, after having seen accused's conviction sheet, and condemns him to the term of eighteen (18) months imprisonment suspended for three (3) years in terms of Article 28A of Chapter 9 of the Laws of Malta.

Having seen the application of defendant Iliya Rnjak filed on the 2nd September, 2014, wherein they humbly pray this Court to vary the sentence appealed by revoking part of the sentence appealed by declaring the appellant not guilty for the charges brought against him and consequently free him from all guilt and punishment according to Law whilst keeping the judgement firm and valid as to the acquittal of the appellant from the charge of voluntary damage or alternatively, and without prejudice, to review the sentence and punishment given.

That the grounds of appeal of defendant Iliya Rnjak consist of the following:

That the conviction is based on the shift of the burden of proof as is required in Section 264(2) of Chapter 9 of the Laws of Malta which reads:

(1) In the case of breaking of pipes of the public water service or of the gas service, or of the wires or cables of the electricity service, or of the meters thereof, or of any seal of any meter, or in the case of the existence of artificial means capable of effecting the unlawful use or consumption of water, gas or electric current, or capable of preventing

or altering the measurement or registration on the meter of the quantity used or consumed, shall, until the contrary is proved, be taken as evidence of the knowledge on the part of the person occupying or having the control of the tenement in which such breaking or artificial means are found, of the said use or consumption of water, gas or electric current, as the case may be.

The Court of Magistrates concludes [a Fol. 9] that: *It is in the word of the Law incumbent on the person occupying or having the control of the tenement in which the alleged tampering is found, to proof the presumption to the contrary.* The Court correctly continues to say that: *Obviously the shift of the onus, burden of proof, in no way exempts the Prosecution from any level of proof. It is still incumbent on the Prosecution to proof that the meter was tampered with .....*

It is here that with all due respect the appellant feels that the Court has aggrieved him. The only proof in front of the Court by the Prosecution is the word of Mario Cassar, an employee of Enemalta Corporation, whose job was to find tempered meters for which he got a hefty commission for each one he found. There again this is not the best evidence that the Prosecution could have produced. As Mario Cassar states *the seals resulted tampered due to the fact that they were fixed with some glue-like substance .....* Why were these seals not produced in Court? Is Mario Cassar's testimony, more than four years after the alleged incident [as this case was presented in Court many years later], the best evidence that can be produced?

Moreover, to Mario Cassar's evidence there is the appellant's evidence. Who is the more credible?

Besides the above two issues regarding best evidence and creibility, the appellant respectfully submits that he has also managed to proof the presumption to the contrary. He does not agree with the conclusion of the Court [a Fol 9] that:*Iliya Rnjak tried to rebut the presumption in what the Court considers to be a very weak defence .....* In actual fact, appellant, more than once in his evidence stated that *he had various problems with the main fuses and proceeded because of this to call Enemalta from five to six times.* This evidence was not rebutted anywhere. The only fact stated [a Fol 3] is the evidence of Alan Chetcuti, the professional executive of Enemalta who stated: *that he could not access to any records for the year 2005 since there was a change in software, being therefore unable to answer as to whether Mr Rnjak*

had ever reported any faults to this particular meter ..... This the Court erroneously imputes to appellant. The Court concludes [a Fol. 10] .... *Iliya Rnjak was not able to proof, due to the fact that no records were held thereof .....* How can a short fall of Enemalta prove in any way that the appellant is not stating the truth;

In any event and without prejudice to the above, the punishment is in any event too harsh in the circumstances;

The grievance put forward by the appellant attacking the judgment delivered by the First Court is directed mainly towards the finding of guilt and that the punishment imposed is excessive. He laments that the First Court made an erroneous appreciation of the facts expounded before it and this when accepting the evidence of the Enemalta employee Mario Cassar as credible when the latter was entitled to a bonus for discovering the tampered meters.

Now it has been constantly affirmed by jurisprudence that a court of second instance will very rarely vary the findings of the First Court based on an appreciation of the facts of the case as outlined in the evidence heard before that Court unless such appreciation was incorrect both legally and factually to the extent that a miscarriage of justice will result based on such conclusions.

The oft quoted maxim delivered in the case R vs Cooper(1969) by Lord Chief Justice Widgery by our courts in their appellate jurisdiction advocates: *"assuming that there was no specific error in the conduct of the trial , an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone . However, should the overall feel of the case – including the apparent weakness of the prosecution evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed."*

Witnesses

During his testimony **Alan Chetcuti**, Professional Executive within the Enemalta Corporation exhibited the estimate of the alleged unregistered consumption of electricity from the 30th April, 2000 up to the 30th April, 2005 amounting to an estimate total of 7,577.70 Euros. Moreover, he also informed the Court that there was a change in the software utilized by Enemalta and thus he had no access to any records of the year 2005.

The inspection was carried out on the 'Lorenzo Restaurant' by the Enemalta tradesmen, namely Mario Cassar and George Farrugia.

Mario Cassar testified that during the 'surprise' inspection at the restaurant the appellant was present and that when they checked the three phase meter bearing serial number 15467050 they noticed that only two seals were found, the meter cover was tampered and there were traces of glue on them. He confirmed that original seals fitted in by the Corporation never made used of glue. He further informed the Court that the restaurant was supplied with a three phase and this meant that since one of these three was open, not all consumed electricity was being registered. He added that the meter was removed and deposited at Enemalta and that at a later stage was exhibited in Court. Both the serial number and readings of the meter matched those noted on the report. Moreover, he insisted that it was the same meter he had removed from the premises in question in the presence of his colleague George Farrugia , PS 171 and PS 46.

The defense insisted that there were strong vibrations going on in the vicinity of the restaurant and questioned Mr Cassar on the matter. Mr Cassar categorically answered that vibrations cannot cause a meter to unscrew the seal. This could only happen in cases where there is a heavy current but there was no such incident on the premises in question.

George Caruana, during his testimony further confirmed that the meter exhibited in the acts of the proceedings was the same on which they had removed from the Lorenzo Restaurant and that they had found a three phase meter which has been tampered with. He further added that the only way one could possibly access the shunt is by breaking away the seals.

John Caruana in charge of where the meters are stored confirmed the same serial number and that it entered the same stores two days later.

Manager at Arms Ltd **Anthony Gauci** testified that he had verified the rate of consumption and noticed that the consumption was were never below fifty (50) units daily but then it dropped to eighteen (18) or twenty (20) daily while before it was 180 units daily.

The appellant took the witness stand before the First Court and explained that he had problems with the main phases and had called Enemalta various times about the matter while presenting a statement covering the years 2000-2005 and that the readings were normal. He further added that there were construction works on the outside of the same restaurant, and a big hole in front of it. Thus, making it close to impossible to function as a restaurant he proved this by presenting various photos. The restaurant was closed for a period of two months and a second time where they had to work for shorter hours and this between the year 2000-2001.
He confirmed that he singularly owned the restaurant from the year 1996. He stressed the point that during construction works he had suffered damage to the kitchen because of the very strong vibrations and that the restaurant was flooded five or six times and when he had called Enemalta no faults were reported.

Pleas

The first plea raised by the appellant concerns the credibility of the witnesses produced by the Prosecution.

The appellant claims that the evidence tendered by Mr Mario Cassar an Enemalta employee, who is a paid a commission if he manages to detect tampered meters is not credible because this is not, in the opinion of the appellant the best evidence the Prosecutor could have produced.

Moreover, the appellant rebuts that he had informed the first court that he had problems with the main fuses and had informed Enemalta about this but when Alan Chetcuti was asked to confirm this, he informed the Court that there was a change in software and that he had no access to the records of 2005 on the matter.

However, the fact remains that the appellant has been the owner of the restaurant for a considerable number of years (over 18 years) and he confirmed this during his testimony. Furthermore, the traces of glue on the broken seal could not have appeared without anyone tampering with it and as Mr Cassar confirmed vibrations alone do not cause seals to be broken.

In the case **Police vs Raymond Abela** decided on the 16th July , 1990. The Court of Criminal Appeal said the following: 'For the Court to apply *'ferocious presumption' the fraudulent means must and have to be conclusive and not based on suspicion. ……the fraudulent means must be such that they stop or change the meter markings.'*

Consequently, the first plea entertained by the appellant cannot be upheld.

With reference to the second plea, this Court notes that the appellant was notified of the charges brought against him by means of a citation on the 20th January, 2009, for the period between April, 2000, and April, 2005. The first sitting of this case was held on the 28th January, 2011, and the case was decided by the first Court on the 21st August, 2014. The appellant had a clean conduct sheet that time and up to now he has still a clean conduct sheet. In the circumstances where the case took so long, the plea of an excessive punishment can be upheld.

Consequently, this Court confirms the judgement of the first Court where it found him guilty of the first charge but set him free from the second charge. With regard to the punishment, this Court revokes and annuls the judgement of the first Court and instead having seen Section 22 of Chapter 446 of the Laws of Malta, sets him free on condition that he commits no further offence for a period of one year from today.