



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

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

Criminal Inquiry No.: 200/2016

**The Police
(Inspector Jonathan Ferris)**

-vs-

Stephen Osei Boateng, holder of Maltese Identity Card No. 0044884A

Today, the 24th day of June, 2019

The Court,

Having seen the charges brought against the accused **Stephen Osei Boateng** for having:

On these Islands, during the month of March 2015 and in the preceding months and years, in various parts of Malta, by means of several acts committed by the accused, even if at different times, which acts constitute violations of the same provisions of the law:

1. Misapplied, converted to his own benefit or to the benefit of any other person, the sum of over €5,000 (five thousand euros) which was 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, which thing was

entrusted or delivered to him by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit to the detriment of Mohammed Hanif (Maltese ID Card number 32487A) and/or Muhammad Mashud Yahya (Maltese ID Card number 29933A) and/or African Eagle Import Export Limited (C52026);

2. By means of any unlawful practice, or by 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 to the belief in the existence, or to create the expectation or apprehension of any chimerical event made gain in excess of five thousand Euro (€5,000) to the prejudice of Mohammed Hanif (Maltese ID Card number 32487A) and/or Mashud Yahya Mohamed (Maltese ID Card number ID 29933A) and/or African Eagle Import Export Limited (C52026), and any other fraudulent gain not specified in the preceding charges;
3. Committed theft aggravated by person and by value to the prejudice of Mohammad Hanif (Maltese ID Card number 32487A) and/or Mashud Yahya Mohamed (Maltese ID Card number 29933A) and/or African Eagle Import Export Limited (C52026) which sum of money is in excess of five thousand Euro (€5,000);
4. For having committed an offence(s) during the operational period of two suspended sentences delivered by Magistrate Dr. F. Depasquale LL.D. and Magistrate Dr. D. Clarke LL.D. both sitting in the Court of Magistrates as a Court of Criminal Judicature, delivered on the 19th February, 2013, and on the 01st January, 2013, respectively;
5. For becoming a recidivist, after being sentenced for any offence by a judgment from the Courts of Magistrates (Malta) which judgments have become absolute;

The Court was also requested that in pronouncing judgment or in any subsequent order, sentence the person convicted to the payment, wholly or in part, to the Registrar of the costs incurred in connection with the employment during the proceeding of any expert or referee, within such period and in such amount as shall be determined in the judgment or order, as per Article 533 of Chapter 9 of the Laws of Malta.

Having seen the note by the Attorney General indicating the Articles of Law in terms of Article 370(3)(a) of Chapter IX of the Laws of Malta dated the 31st May, 2017, namely:¹

¹ Fol.431

- a) Articles 18, 293, 294 and 310(1)(a) of the Criminal Code, Chapter 9 of the Laws of Malta;
- b) Articles 18, 308, 309 and 310(1)(a) of the Criminal Code, Chapter 9 of the Laws of Malta;
- c) Articles 18, 261(c)(d), 267, 268(a)(d), 279(b), 280(1), 281(a), 284 and 285 of the Criminal Code, Chapter 9 of the Laws of Malta;
- d) Articles 18, 28A, 28B and 28C of the Criminal Code, Chapter 9 of the Laws of Malta;
- e) Articles 18, 28A, 28B and 28C of the Criminal Code, Chapter 9 of the Laws of Malta;
- f) Articles 18, 49 and 50 of the Criminal Code, Chapter 9 of the Laws of Malta;
- g) Articles 17 and 31 of the Criminal Code, Chapter 9 of the Laws of Malta;
- h) Articles 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta.

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

Having heard witnesses.

Having seen all the acts and documents exhibited;

Having heard the prosecution and defence counsel make their submissions;

Considers,

Inspector Jonathan Ferris testified how back in January of the year 2016 Mohammad Hanif and Mohamed Mashud Yahya (also referred to in these proceedings as Mohammed Mahsud Yahya or Yahya), both directors of the company African Eagle Export Import Ltd., reported an alleged crime of fraud and misappropriation by Stephen Osei Boateng, an employee of the said company.² Boateng was first employed as a cashier but later became manager of an outlet which traded in worldwide remittance where money was deposited by clients for it to be then transferred outside Malta for family or business purposes. The directors alleged that the accused defrauded the company the sum of ninety

² Fol.14

thousand euros (€90,000). The directors informed the investigating officer that the accused committed the said crime at a time when he was responsible to collect the money deposited by clients with the aim of depositing the end of day proceeds with a local bank. *“When the company started to make cheques it transpired that the daily takings were not matching the amount deposited at the end of the day and in support of this they also provided the undersigned with documentation. It all started on the third January 2014 when the actual takings the proceeds were 13,022.21 Euros but the money banked was 12,695. So here we have also a list of all amounts that fall short, not been deposited, namely it goes from January then to May, then to June, July, August, September, October, November, December 14. For the year 2014 the calculated misappropriated sum which is the difference between the daily takings and the amount deposited in the bank was of 63,629.14 Euros. Same continued also in 2015 leaving an actual discrepance both years included of 90,634.52 Euros.”*³

The Inspector added that after reconciling the takings of the company and deposits made with Bank of Valletta,⁴ it resulted that the workings provided by the directors – exhibited as **Doc. JF3⁵** and **Doc. JF5⁶** - were correct. The injured parties also presented the investigating officer with a written declaration by the accused, who signed as Kwasi Boateng, whereby 2 persons were authorized to transfer monies into the account of Mr. Yahya, one of the directors. The said declaration was witnessed before Notary Dr. Anthony Abela and was drawn up following a meeting between the accused and the injured party when the former was made aware of the afore-mentioned resulting discrepancies.⁷

Joanne Bartolo, in representation of Bank of Valletta, testified that the documentation exhibited by the prosecuting officer were bank statements issued by Bank of Valletta.⁸

Dr. Amanda Poole, in representation of the Registrar of Companies, exhibited the Memorandum and Articles of Association of African Eagle Import Export Limited (C 52026).⁹ Mohammad Hanif, bearer of Maltese

³ Fol.15

⁴ Documentation from Bank of Valletta exhibited as **Doc.JF4** a fol. 26-86

⁵ Fol.24-25

⁶ Fol. 87-156

⁷ Fol.16; Vide **Doc. JF2** a fol.23

⁸ Fol.180; Vide **Dok.JF4** a fol. 26 et seq.

⁹ Fol.197

Identity Card number 32487A, and Mahsud Yahya Mohammed, bearer of Maltese Identity Card number 29933A, were directors of the said company.¹⁰ Documentation exhibited by the witness shows that initially Yahya was director, company secretary and judicial representative of the company with Hanif becoming a director, company secretary (instead of Yahya) and judicial representative only in February, 2015. ¹¹

Joseph Saliba, in representation of Jobsplus, stated that he accused was never employed with African Eagle Import Export Limited.¹²

Mohammad Hanif testified that he runs the company African Eagle Import Export Ltd along with Mohammed Mahsud Yahya. The said company runs three businesses namely, Taste of Africa, Taste of Africa Warehouse and African Eagle Money Transfer. The accused started training with the company in July, 2013, and later started working as self-employed with African Eagle Import Export in the money remittance office. Later that year Yahya appointed Boateng manager to take care of all business related to the said company including the banking and money transfers relating to Taste of Africa. In the latter part of 2014, he had become aware that there was no cash in his account and Yahya was tasked to identify where the money had gone. *"...so he started looking into the daily transactions between the taking which is computerised and then banked, so we can see where the money has disappeared to. He started from the year 2014 beginning to the end of March 2015 and it came to light that there were various irregularities between the taking after the office and the banking, as the taking was totalled by the person who was running the office Mr Boateng he was responsible of banking at the same time. Because he was responsible for banking so he was altering the figures from the taking to what he was actually banking without explanation so we were under the impression that all the money which is taken has been banked. On three occasions he did not bank the taking at all. When it came to light I checked with the bank, I made various enquiries with the bank to find out where is the cash which was dropped in the night safe and the bank came back after various enquiries that **they could not trace those funds which we alleged had been dropped in a night safe.**"¹³. Referring to the statement exhibited as exhibited as **Doc. JF5**, the witness explained "This statement give you the full detail of each date when there was a difference between the taking*

¹⁰ Fol.195-196 and 325

¹¹ Fol.237

¹² Fol.322-323; Vide **Dok. JS** a fol. 324

¹³ Fol.158-159

and the money banking and you can see there was a difference between some of the scripts which was his handwriting so the inscription was done by him, and the banking was done by him so his handwriting is there. When we confronted with him about this package.... he had nothing to say apart from he apologised and he will return the money because he was responsible and he was in charge of it so he is responsible to repay. So we said okay, he kept giving us excuses that he is going to do it, next week, next week and it went on and on and on until he came one day and said he has received the fund from Ghana for 120,000 Euros and the bank is not releasing it, so that saga went on for about two months. Then I told him enough is enough if you have the fund either you can transfer it to our company as account because transferring 120,000 from an unknown place into your company these days is money laundering so there must be some facts and figures before we do that. So he said okay the money will be returned back to Ghana and because all this was going on we could not trust him, so we said okay give us authorisation somebody in Ghana which was one of us his brother and the other one was Mr [Mashud] Yahya's brother, to give them the authority to go to the bank and have the money transferred to my partner's account. That so far we accepted it that the document was signed and sent to Ghana, but after that Mr Boateng was never to answer or his brother or anybody else. So I came to the conclusion that he is not willing or he is not interested in settling, so I approached my lawyer and then we made a declaration" signed before Notary Abela.¹⁴

An examination of **Doc.JF4** and **Doc.JF5** clearly manifests handwritten notes. Hanif states that *"there was a difference between the taking and the money banking and you can see there was a difference between some of the scripts which was his handwriting so the inscription was done by him, and the banking was done by him so his handwriting is there"*¹⁵ without going on to identify which notes allegedly pertain to the accused.

At this junction the Court is obliged to note that the prosecution failed to request a **calligraphy expert to determine which of the writings were made by the accused**, given that not even the injured parties ever indicated the extracts which to their knowledge were written by the accused. Additionally, and in the circumstances, the Court would have expected a request for the appointment of an **auditor tasked with examining in detail the daily transactions and relative supporting documentation and comparing those amounts with the amounts**

¹⁴ Fol.159-160

¹⁵ Fol.159

deposited with the bank. Finally, it still needed to be proven that the tainted deposits were effected by the accused and no other!

Under cross-examination Mohammad Hanif confirmed that when the money remittance business being carried out through the company (African Eagle Import Export Limited) had proved successful and business had increased, another company Worldwide Money Remittances Limited was set up specifically for this goal.¹⁶ Boateng was first employed by African Eagle Import Export Ltd. and subsequently in 2014 and 2015 by Worldwide Money Remittances Limited, “*Directly I was employer myself and Mohammed [Mashud Yahya]*”¹⁷ and further stated that the accused would have been registered with the ETC by Yahya.¹⁸ Although he actually goes on to state “*I presume there is a job contract and I’m sure that Mohammed would have showed him or asked him to read it and sign it or whatever..... I can swear on it. It could be still African Eagle or it might be changed to Worldwide Money.*” Upon being reproduced he confirms that there was no contract of employment as Boateng was self-employed.¹⁹ Yahya was responsible for the day to day operation of the business.

Hanif went on to explain: “*there was a procedure that he should take a printout from the Computer because what was happened is a printout, there is a print, there is a log how much money there is taken and how much the commission is, everything he will take the printout at the end of the day and telling up what’s the money is in the till and try to either bank it or do what we are requested to do mostly we bank it rather in a night safe or in the morning..... He will print it daily, at the end of the shift he has to match up and then if there’s any discrepancy he should inform us. But normally because as I said he took our trust than after a year or two let it do his job and then when we do the accounts than at that time when we do the and checks if the balance are in place.....[Advocate: No. Did Mr. Boateng used to give the persons who use to bring money a receipt?].Yes, yes that’s why I said you cannot hide anything, everything is locked [recte: logged] because that money will not given in any Country until that money has received and accepted by our Company”.*²⁰ The amount of around €90,000 was missing, and this was noticed after the company was wrongly credited

¹⁶ Fol.442

¹⁷ Fol.443

¹⁸ Fol.445

¹⁹ Fol.475

²⁰ Fol.447-448

with monies which when duly re-paid showed that there were hardly any funds left in the account.²¹ Hanif goes on to state that when one deposits monies in the bank's night safe "a small chit from the envelope is kept without invoice and so we can double check that the money has been received. In past that what we used to do that you see the money what the chit says and the moneywith the money in the Bank.....If it's on the weekend it was a large amount than we used to drop it at night before we go home. It was the small amount than it was kept in the night safe at the shop and then bank it the following day." This was done by Yahya and in his absence by the accused, whilst another employee Mohammed Salis at times was also entrusted to make bank deposits.²² In all **three persons were entrusted to make bank deposits, Yahya, Boateng and Salis.**²³ The witness claims that the company arrived at the figure alleged to have been taken by Boateng "once we looked at all the transactions and payments we go by the hand written changes to that sheet and we highlighted all the changes with was done by Stephen Boateng and that's what how we came to this figure. Because if Stephen had wrote that he banked it at the safe fifteen thousand (15,000) and there's only ten thousand (10,000) in the Bank on that day than obviously where is the five thousand (5,000) is his hand writing not anybody else? So he does the totalling up and then giving a package to our goes and bank chit"²⁴. Upon being confronted with these facts the accused had said he was ready to make good for the lost revenue however he kept protracting and finding excuses to avoid settling the amount due.²⁵

The fact that Mohammad Hanif, a director, could not definitively state with which company Boateng was employed and in what capacity clearly goes to show how little he actually knew of the same company's structure let alone how the business was actually being run and operated! It later transpires that there was no contract of employment with either company!!

Notary Dr. Anthony Abela testified that the document "Financial Authorization Letter" marked as **Doc. JF2**²⁶ would have been witnessed by himself after ascertaining the identity of the person making the said

²¹ Fol.448-449

²² Fol.450

²³ Fol.451

²⁴ Fol.452

²⁵ Fol.452

²⁶ Fol.23

declaration, which in this case is a person named Kwasi Boateng bearing the same identity card as that of the accused in these proceedings.²⁷

The accused, **Stephen Osei Boateng**, chose to testify declaring that he worked for Worldwide Remittance for a year and eight months and that his employer was Mohamed Mahsud Yahya. He was never given an employment contract even though so promised by his employer.²⁸ He started working for Yahya in 2013. People would deposit money to be transferred to their relatives. Once he received the money, he would process it and give out the receipt. At the end of the day he would print out the balance sheet to ensure that it tallies with the figure that he had. In October, 2013, he was tasked with depositing the monies and by June, 2014, he was promoted as Manager. It was only in November of the year 2014 that he got to know that Mohammad Hanif was Mohamed Mahsud Yahya's partner because even though he saw him before he never knew who he actually was; so much so, that even when he got orders from Mohammad Hanif he used to confirm such with Mohamed Mahsud Yahya.²⁹ The accused recalled how by end of March, 2015, following a visit by Bank of Valletta and MFSA officials the business was closed down.³⁰ He got to know about the allegations made against him after receiving a call from the High Commissioner of Ghana when Ambassador Kenneth Tachie informed him that there was a problem and he was presented with a form with Mohamed Mashud Yayha's name which stated that twenty four thousand euros were lost.³¹

When asked to explain the procedure adopted in the course of his work he declared that when a person wanted to transfer monies, he would collect the identity card of the said person and would take note of the name and amount to be transferred so as to input the information in the system.³² The accused stated that there were instances where the system's software used would generate transactions automatically and he duly informed Yahya about same so that the fault could be rectified.³³ The accused also stated that Mohammad Hanif also had the said software

²⁷ Fol.339-340

²⁸ Fol.478

²⁹ Fol.479

³⁰ Fol 480

³¹ Fol.481

³² Fol.481-482

³³ Fol.482

installed on his laptop to enable him to monitor transactions on a daily basis.³⁴ Responsible for making bank deposits were both Yahya and Hanif, as well as himself. Boateng recalls an episode whereby he was asked by Yahya to give money to a certain Caman but he refused initially although he complied afterwards. This happened on a number of occasions as did the occurrence that he used to take cash from the client's deposits to pay for the monthly rent (€600) and salaries.³⁵ The accused makes reference to another episode which took place in January, 2015, where he was again asked to give five thousand euros to Caman and further confirmed that only Yahya knew of this thereby leaving Hanif in the dark.³⁶ Asked by the Court what could be the cause for the resulting discrepancies in the remittances received and those deposited, the accused attributes this to the monies paid out to Caman and that taken to pay rent or in consideration of his salary:

Court: So you are saying that the discrepancy would be what was actually being the deposit and actually reflected in the banking transaction is because you would have been paying out cash?

S. O. Boateng: Exactly³⁷

Asked about the document signed in front of the Notary the accused says that this was drawn up following agreement to open a restaurant in Hamrun together with Mohamed Mahsud Yahya. He states that in the "*Financial Authorization Letter*" he mistakenly indicated as his cousin's name Samwel Asamoah instead of Isaac Asamoah.³⁸

It is being immediately stated that the Court finds it extremely hard to believe that the accused genuinely mistook his relative's name!! Moreover, whilst in his testimony the accused refers to Isaac as his cousin, on the letter he declares that he is a brother. The importance of having correct details in a letter which he himself chose to have authenticated before a Notary Public cannot be underestimated and thus making a declaration of this purport with incorrect information speaks for itself. Nonetheless no evidence was brought forward to indicate that the account number or persons therein mentioned do not exist, thereby

³⁴ Fol.483

³⁵ Fol.484-486

³⁶ Fol. 488

³⁷ Fol.489

³⁸ Fol. 490

militating against the accused's version of events from being given due credibility!

Halid Chiatikpe Kamaladeen confirmed that on the 31st of March, 2015, he was given €5,000 by the accused upon an agreement reached with Yahya, insisting however that this occurred only on one occasion and not on several times as stated by the accused.³⁹

Having examined the acts of these proceedings the Court makes the following observations:

- Although Hanif and Yahya declare that discrepancies emerged following a reconciliation between the chits (relating to night safe deposits) produced by Boateng and bank's invoices, and the actual takings/remittances made by clients, coupled to the hand-written annotations allegedly done by Boateng on the deposit slips/transaction sheets, no evidence was produced establishing beyond reasonable doubt the daily takings registered with the company.
- Nor was any proof brought forward of the actual chits which Boateng is said to have drawn up when depositing monies in the night safe and which it is maintained did not tally with the actual amount physically deposited.
- No evidence was produced which could contradict the accused's version that in the course of the daily operation of the business, cash payments were being made and were so authorised, primarily monthly rent payments of €600 and the accused's salary which he mentions was of €2,000.⁴⁰ The fact that the accused was paid a salary goes on to contradict Hanif's statement that the accused was self-employed with one of the company's!!
- Whilst Hanif attributes the resulting discrepancy to inconsistencies between the amount claimed by Boateng to have been put in the night safe and the actual amount so deposited, it is only on rare occasions that deposits were made through night safe services. The

³⁹ Fol.507

⁴⁰ Fol.486

bank statements clearly indicate when a deposit was made physically as distinct from when it was left in the night safe wherein in the latter case this results clearly from the detail of the same transactions "BAG".⁴¹

- No evidence was produced that it was actually the accused who effected the deposits, whether by going personally to the bank or by putting them in the night safe.
- The fact that there was no professional record-keeping relating to monies paid out in cash from the monies received as remittances either by way of salaries, rent or other expenses to which reference is made in the testimony of the very same directors, suffices to undermine the soundness of the allegations and evidence tendered before this court.
- Whilst it was stated by Yahya and Hanif that the company receiving the remittances was WorldWide Money Remittance (Malta) Ltd. - as evidenced also in the daily transaction sheet for the 3rd January, 2014⁴² - the money was deposited in the account of African Eagle Imp/Exp. Ltd.⁴³
- The prosecution rested entirely on workings made by the company's directors which leave much to be desired for the reasons afore-mentioned. The mere annotation by the injured parties to specific banking transactions referring the court to a summary of what they believe is tantamount to a discrepancy, cannot by any stretch of the imagination be deemed to have reached the requisite level of proof demanded in criminal proceedings.
- Undoubtedly the way in which the business was being operated leaves much to be desired. It was unorganised at best, unprofessionally run and artfully mismanaged as evidenced by conflicting statements by the directors regarding the company with which Boateng was employed, whether he had a contract of employment with any of the said companies and more importantly

⁴¹ Vide examples inter alia a fol.55, 57, 59

⁴² Fol.90-91

⁴³ Fol.92

whether the company allowed cash withdrawals for the purposes cited.

Having examined the evidence or rather lack of it, the Court must now address the different offences with which the accused stands charged, namely those of misappropriation, fraud and theft.

Reference is made to the judgement **Il-Pulizija vs Enrico Petroni u Edwin Petroni**⁴⁴ where the Court underlined the differences between the crimes of fraud, theft and that of misappropriation:

Dan ir-reat [ta' approprijazzjoni indebita] jiddistingwi ruhu mir-reat ta' serq, ghax l-oggett li jkun, jigi moghti mill-agent volontarjament u mhux jittiehed kontra l-volonta` jew minghajr il-kunsens tad-detentur; u jiddistingwi ruhu ukoll mit-truffa ghax id-detentur tal-haga ma jigix ingannat permezz ta' raggiri jew artifizji biex jitlaq minn idejh dik il-haga favur l-agent.

In **Il-Pulizja vs Carmela German** the Court of Criminal Appeal provided:⁴⁵

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 patrimonjali bil-konsegwenti qligh ghallagent ... jekk l-ingann jew qerq ikun jikkonsisti f'raggiri jew artifizi - dak li fid-dottrina jissejjah ukoll mis en scene - ikun hemm it-truffa; jekk le ikun hemm hemm ir-reat minuri ta' frodi innominata (jew lukru frawdolenti innominat).

In **Il-Pulizija vs Marjanu Zahra**⁴⁶ the Court of Magistrates (Malta) examined in great detail the elements of the offence of fraud:

*Biex jissussti ir-reat tal-frodi jew truffa gie ritenut kostantement filgurisprudenza u fis-sentenzi tal-qrati taghna illi iridu jinkonkorru diversi elementi. Ilda biex irid ikun hemm ness bejn is-suggett attiv u is-suggett passiv tar-reat u cioe' bejn minn qieghed jikkometti ir-reat u il-vittma. Hemm imbaghad l-element materjali ta' dana ir-reat u cioe' l'uzu ta' ingann jew raggieri li iwasslu lil vittma sabiex isofri it-telf patrimonjali. Finalment huwa necessarju li ikun 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 lelementi huma nieqsa, allura ir-reat tat-truffa ma jistax jisussisti. Illi f'sentenza moghtija mill-Qorti ta'l-Appelli Kriminali (per Imhallef Carmel. A. Agius) deciza fit-22 ta' Frar 1993, fl-ismijiet **Il-Pulizija vs Charles Zarb**, il-Qorti ghamlet esposizzjoni ferm preciza studjata u dettaljata ghar-rigward ta' l-elementi ta' dana ir-reat. Il-Qorti bdiet sabiex esprimiet ruhha b'dan ilmod ghar-rigward ta' dana ir-reat:*

⁴⁴ 09.06.1998.

⁴⁵ Per Hon. Mr. Justice Vincent Degaetano; Dec.30th December, 2014

⁴⁶ Per Magistrate Dr. Edwina Grima; Dec. 2nd March, 2011

“Id-delitt tat-truffa huwa l-iprem fost il-kwalitajiet ta’ serq inpropri 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 Francis ... Id-disposizzjonijiet tal-Kodici taghna li jikkontemplaw ir-reat ta’ truffa kienu gew mehuda minn Sir Adriano Dingli mill-paragrafu 5 ta’ l-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”. Skond giurisprudenza kostanti, lingredjenti ta’ l-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 socjali tal-fiducja reciproka firrapport patrimonjali individwali, hawn qed jittutela l-interess pubbliku li jimpedixxi l-uzu ta’ l-ingann u tar-raggieri li jinducu bniedem jiddisponi minn gid li fil-kors normali tan-negojju ma kienx jaghmel.

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

- a. b’mezzi kontra l-ligi, jew*
- b. billi jaghmel 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, jew ta’ hila*
- g. setgha fuq haddiehor jew*
- h. ta’ krediti immaginarji jew*
- i. sabiex iqanqal tama jew biza dwar xi grajja kimerika, jaghmel qliegh bi hsara ta’ haddiehor.*

.... Hu necessarju biex ikun hemm ir-reat ta’ truffa, li l-manuvri jridu jkunu ta’ natura li jimpressjonaw bniedem ta’ prudenza u sagacija ordinarja, li jridu jkunu frawdolenti u li hu necessarju li jkunu impjegati biex jipperswadu bl-assistenza ta’ fatti li qajmu sentimenti kif hemm indikat filligi.”

*Dwar l-artifizji intqal mill-Qorti illi “hemm bzonn biex ikun reat taht l-artikolu 308 illi l-kliem jkun akkumpanjat minn apparat estern li jsahhah il-kelma stess fil-menti ta’ l-iffrodat. Din it-tezi hija dik accettata fil-gurisprudenza ta’ din il-Qorti anke kolleggjalment 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 mensioniera e falza, ma richiede inoltre che siano state impiegate, inganno, raggio o simulazione, ed e’ necessario quindi che la falza asseriva sia accompagnata da qualche atto diretto a darla fede.”*

Ghar-reati ta’ truffa komtemplat fl-artikolu 308 tal-Kodici kriminali, il-Qorti iccitata lill-Imhalled Guze Flores fejn qal illi “kif jidher mid-dicitura partikolari deskrittiva adoperata, hemm bzonn li tirrizulta materjalita’ specifika li sservi ta’ supstrat ghall-verosimiljanza talfalsita prospettata bhala vera u b’hekk bhala mezz ta’ qerq. Ma huwiex bizzejjed ghal finijiet ta’ dak l-artikolu affermazjonijiet, lusingi, promessi, minghajr l-uzu ta’ apparat estern li jirrivesti bi kredibilita’ l-affermazjonijiet menzjonjieri tal-frodatur. Il-ligi taghti protezzjoni specjali kontra l-ingann li jkun jirrivesti dik ilforma tipika, kwazi tejratri, li tissupera il-kawtela ordinarja kontra s-semplici u

luzingi, u li taghti li dawk l-esterjorita ta' verita kif tirrendi l-idea l-espressjoni felici fid-dritt Franciz mise-en-scene."

"...Kwantu jirrigwarda l-element formali, cioe' kwantu jirrigwarda d-dolo ta' dan ir-reat ta' truffa, jinghad 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 tieghu. Lingustizzja tal-profitt tohrog mill-artikolu 308 tal-Kodici Kriminali fejn il-kliem "bi hsara ta' haddiehor" ma jhallux dubbju dwar dan. Jigifieri biex ikun hemm l-element intenzjonali tar-reat ta' truffa, hemm bzonn li s-suggett attiv tar-reat fil-mument talkonsumazzjoni tieghu ikun konxju ta'l-ingustizzja tal-profitt u b'dan il-mod il-legittima produttivita tal-profitt hija bizzejjed biex teskludi d-dolo."

On fraud in terms of Article 309 that Court held:

*Illi l-artikolu 309 tal-Kapitolu 9, imbaghad jikkontempla ir-reat minuri talfrodi innominat. Illi ghar-rigward ta' dana ir-reat, ghalkemm l-element tar- "raggiri" jew l-"artifizji", huwa nieqes u allura anke gidba semplici hija bizzejjed ghal kummissjoni ta' dana ir-reat, izda dana irid bil-fors iwassal sabiex il-vittma u cioe' is-suggett passiv ta' dana ir-reat isofri xi telf patrimonjali. Illi kif gie deciz fis-sentenza **Il-Pulizija vs Carmela German** (Appelli Kriminali Inferjuri 30/12/2004): "Kwantu ghal kwistjoni jekk il-gidba semplici – a differenza ta' l-artifizji u raggiri – tistax tammonta ossia twassal ghar-reat ta' frodi innominata, ir-risposta hija certament fl-affermattiv, basta li tali gidba tkun effettivament tammonta ghal qerq, cioe' intiza jew preordinata sabiex il-persuna lohra (il-vittma) taghmel jew tonqos milli taghmel xi haga li ggibilha telf patrimonjali bil-konsegwenti arrikkiment ghal min jghid dik ilgidba u basta, s'intendi li tkun effettivament waslet ghal dana it-telf min-naha u arrikkiment min-naha l-ohra.*

Hence there is no doubt that in the case under review there results no *mis-en scène*, deceit, pretences or trickeries employed by the accused. It is consequently the offence of misappropriation which assumes relevance given that the monies were being handled by the accused with the blessing of Mohamed Yahya and later of Mohammad Hanif; an element which precludes the offence of theft.

In the proceedings **The Police vs Artur Arakelyan** the Court of Magistrates (Malta) held:⁴⁷

The crime of Misappropriation

In a judgment delivered by the Court of Magistrates (Gozo) it was decided:

"Skond gurisprudenza kostanti u anke skond awturi, generalment huwa ritenut li l-estremi ta' dan r-reat ta' approprjazzjoni indebita huma dawn li gejjin:

1. Illi l-pussess tal-haga jkun gie trasferit lis-suggett attiv tar-reat voluntarjament mill-proprietarju jew detentur, ikun min ikun. Jigi specifikat hawnhekk biex ma jkunx hemm

⁴⁷ Per Hon. Magistrate Dr. Edwina Grima, Dec. 17th of July 2013

ekwivocita, li l-konsenja da parti tal-proprietarju jew detentur lil agent jew lis-suggett attiv tad-delitt, trid tkun maghmula *con l'animo di spostarsi del possesso*, ghax altrimenti jiffugura mhux r-reat tal-appropriazzjoni ndebita, imma s-serq.

2. Illi t-trasferiment tal-pussess ma jridx wkoll ikun jimporta t-trasferiment tad-dominju cioe tal-propjeta' ghaliex f'dan il-kaz ma jiffugurax l-element tal-azzjoni ndebita.
3. Illi l-oggett irid ikun mobbli;
4. Illi l-konsenjatarju in vjolazzjoni tal-kuntratt jaghmel tieghu il-haga cioe japproprja ruhu minnha, jew jbiegha, jew jiddistruggiha *a proprio commodo o vantaggio*;
5. Irid ikun hemm wkoll l-intenzjoni tas-suggett attiv tar-reat li japproprja ruhu mill-oggett li jkun jaf li huwa ta' haddiehor" (**The Police vs Marbeck Cremona** – 15/02/2007)

Also in another judgment delivered by the Court of Criminal Appeal in its inferior jurisdiction, the Court listed the legal elements which constitute the crime of misappropriation (**The Police vs Enrico Petroni and Edwin Petroni** – 09/06/1998)-

"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; (3) u minflok ma jaghmel hekk idawwar dawk il-flus jew dak l-oggett bi profitt ghalih jew ghal haddiehor."

Consequently for the prosecution of the crime to be successful, the author of it must have the specific intention to make use of the object entrusted to him for a specific purpose, as if he were the owner and therefore make use thereof or disposing of the same, at a resultant profit for himself or for others. The jurist **Francesco Antolisei** explains:

"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**, Giuffrè (Milano), 1986, Parte Speciale, Vol. 1, p. 276)⁴⁸

The key phrases in the law lie in the words "**under a title which implies an obligation**" and "**to make use thereof for a specific purpose**" – a purpose specified by the person delivering the object to the agent or agents, which person has the right to impose an obligation on the agent regarding the use to be made of the object entrusted to his care. If the agent proves that he has made use of such object according to the instructions given to him, then he cannot be found guilty of the commission of this offence.

Finally the *mens rea* or the intention of the agent must be proven beyond reasonable doubt – the intention to make a gain or profit from the misappropriation of the object entrusted to him. In another judgment delivered by the Court of Criminal Appeal in its inferior jurisdiction in the case **The Police vs Dr. Seigfried Borg Cole** (23 December 2003) the Court quoted the jurist Luigi Maino with regards to the intentional element necessary for the commission of this crime. (**Commento al Codice Italiano UTET (1922)** Vol IV para 1951 pagina 105 – 106):

⁴⁸ **The Police vs Francis Camilleri** - 25 June 2001 – Court of Criminal Appeal (Inferior)

“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 conversione 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 dispone 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 devianti 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.”⁴⁹

Consequently from the above it results that the crime of misappropriation is based on the abuse of trust given to the agent, which abuse results in the consequent mishandling of any object by making use of the same for personal gain or profit whether financial or otherwise.

From the evidence and documentation provided there is an absolute lack of proof that the accused profited or made any gain, for himself or others, from the funds which it is alleged he kept to himself instead of depositing in the account of either African Eagle Import Export Ltd or Worldwide Remittances (Malta) Ltd! Indeed, there is no evidence in these acts which indicates that the deposits, which were highlighted by the injured parties as being less than what ought to have been deposited, were even made by the accused. Moreover, as stated above, no evidence was produced that it was the accused who was depositing less monies than what he was claiming to be depositing!

Consequently, on the basis of the evidence found in the acts of the proceedings the Court cannot but acquit accused of all the charges brought against him.

⁴⁹ Vide also the same reasoning in **The Police vs Pieter Marinus Van Gelder**, Court of Magistrates (Gozo); Per Hon. Magistrate Dr. J. Mifsud; Dec. 31st January, 2019;

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