

**In the Court of Magistrates  
as a Court of Criminal Judicature**

Magistrate Dr Brigitte Sultana LL.D. LL.M. (Cardiff) Adv. Trib. Eccl. Melit.

Today, 15<sup>th</sup> May 2020

The Police  
(Inspector Bernard Charles Spiteri)

vs

Eldhose Joy

**The Court;**

After seeing the charges in respect of Eldhose Joy holder of Indian Passport R3323861, aged 22 years, son of Joy and Molly, born in Kolencherry Kerala, India, on the 18 July 1997 and residing at 'St. Michael Court', Block D, Felic Grech Street, Gharb, Ghawdex and having charged him that on some day during the month of January 2020 from the Kempinski Hotel, Rokon Street, St. Laurence Gozo he;

1. Committed theft of a laptop of the make Hp, which value exceeds hundred and thirty-two euro and ninety four cents (€232.94) but does not exceed two thousand and three hundred and twenty-nine euro and thirty seven cents (€2,329.37), which theft has been aggravated by amount and person to the detriment of Bernard Mifsud and/or the Management of the Kempinski Hotel and this in breach of article 261, 267 and 268 of Chapter 9.

2. And also for having on the same place, date, time and circumstances committed theft of a bicycle of the make Atala, which value exceeds hundred and thirty-two euro and ninety four cents (€232.94) but does not exceed two thousand and three hundred and twenty-nine euro and thirty seven cents (€2,329.37), which theft have been aggravated by amount and person to the detriment of Elton Paul Whitehouse and/or other persons and this in breach of article 261, 267 and 268 of Chapter 9.

And also for having on the 23<sup>rd</sup> April 2020 and during the previous weeks and months at Gharb Gozo or in the these Islands;

3. Knowingly received or purchased any property which has been stolen, misapplied or obtained by any means of any offence, whether committed in Malta or abroad, or shall knowingly take part, in any manner, whatsoever, in the sale or disposal of the same and this in breach of article 334 of chapter 9.
4. And also for having on the same place, date, time and circumstances without the intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right or in any other manner unlawfully interfered with the property of Bernard Mifsud and/or the Management of the Kempinski Hotel and this in breach of article 85 of Chapter 9.

Having seen that the prosecuting officer confirmed the charge on oath during the sitting of the 30th April, 2020.

Having also seen that the Attorney General declared by means of a note exhibited at fol. 19 that he granted his consent to this case being dealt with summarily;

Having seen that the accused, in reply to the question posed in terms of Article 392(1)(b) of the Criminal Code by the Court declared that he was guilty of the first and fourth charge but that he was not guilty of the second

charge. Furthermore he also stated he was not admitting to the third charge as it is an alternative to first and second.

In view of this declaration of guilt regarding the first and fourth charges, the Court warned the accused in the most solemn manner about the consequences arising out of his guilty plea and granted him a reasonable time in order for him to retract this guilty plea.

After conferring with his defense lawyer the accused once more pleaded guilty to the first and fourth charges and reiterated his innocence regarding the second charge.

In view of the fact that the accused did not admit to the second charge, the case was adjourned for the 11<sup>th</sup> May, 2020 so that the prosecution produces evidence regarding this charge.

Having seen the documents supplied and having heard the testimony of the witnesses produced;

Having seen the records of the proceedings as well as the criminal record sheet of the accused;

Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel;

**Considers the following:**

During the sitting of the 11<sup>th</sup> May, 2020 the court heard **Bernard Mifsud**, witness for the prosecution, solemnly declare that in April of the current year, in his capacity as financial controller of Kempinski Hotel and as a member of the executive management team filed a report with the police wherein he reported some items which had gone missing from the premises. One of the items was a Laptop computer which was used by staff at the front office desk. The staff had reported it missing. Mr. Mifsud stated that the Laptop was returned to the Hotel by the Police.

Another item which was reported missing was a bike, which was not owned by the hotel but by a sub contractor called "On Two Wheels". These bikes were rented out to clients on demand. Mr. Mifsud further stated that the bike was noted missing only when the sub contractor went to the hotel to collect the bikes after the hotel closed due Covid-19 and noticed that one bike was not in the garage. The witness was not sure as to the exact date when this happened.

Mr. Mifsud further declared that he filed the police report after a person who used to work at the hotel, and who is a friend of the accused on social media informed him that he had seen postings on the accused's social media account which included the company lap top and bicycle. He confirmed that prior to receiving this information the company did not file any report with the police. The witness added that he gave the police all the details and a copy of the photos found on the accused's social media account.

As regards the accused's employment at the hotel Mr. Mifsud stated that the accused was not employed with the hotel directly but that the hotel had a contract with a company Total Management, to provide the hotel with the required personnel. The hotel provides these individuals with the uniforms.

As to the period during which the accused worked at the hotel Mr. Mifsud stated that as far as he can recollect, though he was not absolutely sure, the accused worked in January but does not know the exact day when he was there last.

As regards the bicycles, the witness stated that after checking the facts with the person who was managing the leasing out of these bicycles at the hotel, he was in a position to state that clients approach the front office desk for a bicycle. It is the porter who is given the key to unlock the chain securing the bicycle. The porter accompanies the client to the garage, unlocks the bicycle and hands it to the client. When the client returns to the hotel the bicycle is handed over to the porter who takes it back to the garage and locks it. The key is then returned to the front desk. The bicycles are kept in the garage. The charge for the lease is entered into the client's bill as is the case with every service given by the hotel. Mr. Mifsud stated that staff are

not meant to make use of these bicycles.

On counter examination the witness stated that the laptop is used by the staff at the front office desk. He could not confirm the exact date when the computer went missing. He further confirmed that he does not know the exact date nor the period in which the bike actually went missing and that it was the sub contractor that drew their attention to the fact.

When asked to confirm the number of bicycles in the garage the witness could not give the exact number. He stressed that though the garage is accessible to everyone, yet the bicycles are locked and the keys are held at the front office.

When asked about the photos the witness confirmed that he had obtained them from Balage Pongratz, a colleague of the accused who worked at the front office. Mr. Mifsud confirmed that the photos were screen shots taken by this colleague and passed on to him. He also confirmed that the information he had gathered about the procedure followed in the leasing of the bicycles was from this Balage as well. When asked to confirm that staff are never allowed to make use of bicycles the witness stated that he could not be sure.

Finally when asked to confirm day when the lap top was noticed missing he stated that it was on the 28<sup>th</sup> January, but did not report it to the police up until he saw the photos which was in April of the current year.

The prosecution then called the witness **Elton Whitehouse** who under oath stated that he rents out scooters and mountain bikes from Marsalforn throughout the island. He further stated that in the beginning of March he had just come back to Gozo from a holiday and he went to the Kempinski Hotel to check the bicycles for serviceability.

He then added that during the second week in February he went to the Kempinski Hotel, went to reception and asked for the four keys of the four bikes that were in the garage but was given only three keys. He stated that the mountain bikes are green in colour and recognizable. He reported the

missing bicycle to the hotel but they could not recall if anything had been rented out.

Mr. Whitehouse stated that the rent is twelve euro fifty (€12.50) per diem, but if the client rents it for a longer period they apply a discount. Asked to confirm if the hotel allowed staff to make use of the bicycles, the witness stated that if that had been the case the hotel would have contacted him. There were times when he had been asked for authorization and he had let the employee have it for free. In these cases the hotel was supposed to be asked first. In this present case he had not been approached.

On being shown the photo exhibited in the records of the case a fol.34, the witness identified the bicycle one which belongs to his company. He further confirmed that its value is three hundred euro (€300).

During cross examination Mr. Whitehouse stated that he had asked the hotel to tell him what the procedure was as regards the lease of the bicycles to hotel clients as he did not know. He further added that the last time he was at the hotel to check the bicycles was around the twentieth (20<sup>th</sup>) of December.

### **Considers further:**

This Court is a court of criminal jurisdiction, hence it has to be convinced beyond a reasonable doubt as to the guilt of the accused. Lord Denning in the case **Miller v Minister of Pension** had this to say: *“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 short of that will suffice.”*<sup>1</sup>

---

<sup>1</sup> 1947, All ER 372

The Court notes that the accused entered an early guilty plea in respect of the first and fourth charge. However from the outset he did not admit guilt as regards the second charge, that is the theft of the bicycle of the make Atala.

The court shall therefore analyse the evidence submitted by the prosecution in relation to this charge. To start with most of the testimony given by Mr. Bernard Mifsud constitutes information which this witness gathered from third sources. He did not have any first hand knowledge of how the system regarding the lease of bicycles worked and he had to rely on the information given to him by the same person who had furnished him with the social media photos. This person identified as Balage Pongratz worked at the front office desk with the accused.

It is pertinent to note that it is incumbent on the Prosecution to submit the best evidence to the Court's scrutiny and this in line with the principle enunciated by the eminent jurist Manzini who in his book (*Diritto Penale* Vol. III Kap IV page 234, Edizione 1890) stated that "*Il cosi' detto onero della prova, cioe' il carico di fornire, spetta a chi accusa - onus probandi incumbit qui osservit.*"<sup>2</sup> In the present case the prosecution failed to summon Mr. Pongratz to get a first hand account of the facts. It also failed to provide evidence that the photos were taken from the accused's personal account. Indeed the photos exhibited by Mr. Bernard Mifsud were handed to him by a third party and hence this witness was not in a position to attest as to their origin. This undermines the probatory value of such important piece of evidence.

Mr. Whitehouse testified that it was him who drew the attention of the staff at the front office desk that the bicycle was actually missing. In the opinion of this court if the staff had been following the procedure for the lease of bicycles as described by Mr. Bernard Mifsud, they would have noticed that a key was missing at their desk. Yet no alarm was raised up until Mr. Whitehouse went to the garage to check on the bicycles. Considering the fact that according to Mr. Whitehouse's testimony he went to inspect the bicycles in February this leads the Court to conclude that the time or date when the alleged theft took place is also very nebulous and does not tally

---

<sup>2</sup> *Il-Pulizija vs Neil Zammit*, Court of Criminal Appeal, 14<sup>th</sup> January, 2020.

with the period specified in the charge sheet – “some day during the month of January 2020”. It is the opinion of this court that since Mr. Whitehouse last saw all the bicycles on December 20<sup>th</sup>, 2019 and then he found out that one was missing in February, then logically the bicycle could have been removed from the garage with that latitude of time – December to February.

Furthermore the Court notes that from the 20<sup>th</sup> December, 2019 till February 2020 none of the front office staff including therefore Mr. Balage Pongratz reported the loss of the bicycle. This leads the court to conclude that the procedure aforementioned by Bernard Mifsud was definitely not followed rigorously. Indeed it so appears that the employees were either wholly unaware that a key was missing from the front desk or else they were aware that a bicycle was actually being used outside the parameters of the procedure for lease. Their lack of preoccupation regarding the missing key leads the Court to deduce that there was a *laissez faire* attitude at the front desk.

As to the theft the Maltese Criminal Code does not define “theft”. However Maltese Courts have followed the definition of Carrara: “*Contrectatio dolosa della cosa altrui, fatta invito domino, con animo di farne lucro.*” According to Professor Anthony Mamo in his notes on Criminal Law, this definition provides five elements that need to be fulfilled in order for the crime of theft to be deemed integrated. These are:

1. The *contrectatio* of a thing;
2. belonging to others;
3. made fraudulently;
4. without the consent of the owner;
5. *con animo di farne lucro* – the intention to make a profit.

The *contrectatio* is the taking of an object by the active subject. The object has to belong to the passive subject. The active subject acts with the precise intention to take the object from the passive subject and deprive him permanently of it, hence without any the intention of returning the object to him.



Carrara further states that *“Il dolo specifico del furto consiste nell’intenzione di procurarsi un godimento o piacere qualunque coll’uso della cosa altrui ... per lucro qui non s’intende un effettivo locupletazione ma qualsiasi vantaggio o soddisfazione procurata a se stesso.”* As aforestated in this case it was not proved beyond any reasonable doubt that the accused took the bicycle to the detriment of its owner. It may well have been the practice adopted at the front desk, unbeknown to management that an employee could make use of it as otherwise why did no one raise the alarm when the key went missing?

The Court is also perplexed that Mr. Pongratz thought it fit to alert Mr. Mifsud to the loss of the bicycle by furnishing him with the screenshots allegedly taken from the accused’s social media accounts months after he had failed to report the missing bicycle immediately when the key did not turn up at the desk. The court also notes that Mr. Pongratz was employed at the hotel as well and it was also his duty to follow the procedure outlined by Mr. Mifsud rigorously.

As to the screenshots it is to be noted that there is no evidence that the account from which the screenshots were taken actually belongs to the accused. No proof as to the source was made and hence the Court cannot rely on their authenticity.

Finally the Court notes that the accused admitted to two charges at an early stage of the proceedings, the lap top and the uniform were returned to the Police and the criminal record sheet of the accused is immaculate.

**Decides: -**

Consequently, decides that after having seen Articles 261, 267, 268, 279(a), 280 (1), 334 and 85 of the Criminal Code finds the accused Eldhose Joy guilty of the first and fourth charges;

As to the second charge this Court finds the accused not guilty of the charge proffered against him and consequently acquits him;

As to the third charge this Court abstains from taking further cognizance of such charge as it is an alternative to the first and second charges.

Therefore the Court hereby condemns Eldhose Joy to nine months imprisonment which however after having seen Article 28A of the Criminal Code it orders that the said sentence shall not take effect unless, during a period of three years from the date of this order, the offender commits another offence punishable with imprisonment and thereafter the competent court so orders under Article 28B of the Criminal Code that the original sentence shall take effect.

In terms of Article 28A(4) of the Criminal Code, the Court declares and explains in ordinary language to the accused his liability in terms of Article 28B of the Criminal Code if during the operational period he commits an offence punishable with imprisonment.

The Court orders that the records of the proceedings together with this judgment be transmitted to the Attorney General within six working days.

(sgd.) Dr. Brigitte Sultana  
Magistrate

(sgd.) Maureen Xuereb  
D/Registrar

True copy

D/Registrar