



Court of Criminal Appeal

Hon. Ms. Justice Dr. Consuelo Scerri Herrera LL.D.

Appeal number: 135/ 2018

The Police

Inspector Ian Joseph Abdilla

Inspector Paul Vassallo

Vs

Konstantin Alexander Anastasiou

Today the 29th September 2020

The Court,

Having seen the charges brought against Konstantin Alexander Anastasiou holder of Austrian passport number J01576877 or Greece Passport number N.519180, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

On these islands, on the 12th March 2004 and in the preceding months, in various parts of Malta, by means of several acts committed by the offender, even if at different times, which acts constitute violations of the same provisions of the law;

1. For having, 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 to 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 LM 11,000.00 to the detriment of Dragon Co. Ltd and Mr. Robert Tonna and this in breach of Sec. 18, 308, 309 and 310 of chapter 9 of the Laws of Malta;

2. For having, 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 to 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 LM 2,500.00 to the detriment of Vanir Co. Ltd. and Mr. Joseph Schembri, and this in breach of Sec. 18, 308, 309 and 310 of Chapter 9 of the Laws of Malta;
3. Also, for having during the same period, misapplied, converting to his own benefit or to the benefit of any other person, the sum of LM 11,000.00 to the detriment of Dragon Co. Ltd and Mr. Robert Tonna, which sum has been 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, and this in breach of Sec. 18, 294, and 310 of Chapter 9 of the Laws of Malta;
4. For having during the same period, misapplied, converting to his own benefit or to the benefit of any other person, the sum of more than LM 2,5000.00 to the detriment of Vanir Co. Ltd. and Mr. Joseph Schembri, which sum has been 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, and this in breach of Sec. 18, 294, and 310 of Chapter 9 of the Laws of Malta;

5. Also, for having during the same period, knowingly committed forgery of any authentic and public instrument or of any commercial document or private bank document, by counterfeiting or altering the writing or signature, by feigning any fictitious agreement, disposition, obligation or discharge, or by the insertion of any such agreement, disposition, obligation or discharge in any of the said instruments or documents, after the formation thereof, or by any addition or alteration of any clause, declaration or fact which such instruments or documents were intended to contain, or prove and this in breach of Sec. 18 and 183 of Chapter 9 of the Laws of Malta;
6. For having, during the same period, knowingly made use of any of the false acts, writings, instruments or documents, and this in breach of Sec. 18 and 184 of Chapter 9 of the Laws of Malta;
7. Also, for having, during the same period, knowingly committed any other kind of forgery, or shall knowingly made use of any other forged document, and this in breach of Sec. 18 and 189 of Chapter 9 of the Laws of Malta;

Besides awarding the punishments prescribed by Law, the Court was kindly requested that, in pronouncing judgment, or in any subsequent order, sentence the person convicted or the persons 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, and this in terms of Sec. 533 of Chapter 9 of the Laws of Malta.

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 7th of March, 2018 whereby the Court, having seen Articles 17, 18, 20, 23, 30, 31, 308, 309, 310, 294, 183, 184, 189 and 533 of Chapter 9 the Laws of Malta, whilst abstaining from taking further cognisance of charges (3) and (4) for reasons above outlined, found and declared Konstantin Alexander

Anastasiou, also known as Konstantinos Anastasiou guilty of charges (1), (2), (5), (6) and (7) proffered against him and consequently condemned him to imprisonment for a term of two (2) years which however, in terms of Article 28A of Chapter 9 of the Laws of Malta, shall not take effect unless the offender commits another offence punishable with imprisonment within the operational period of four (4) years.

Moreover, in terms of Article 28H of the Criminal Code, the Court ordered the offender to return to injured parties, Robert Tonna and Joseph Schembri, the sums of €25,623 and €4659 respectively (sums obtained by fraud and equivalent to LM11,000 and LM2000 respectively) within four months.

The Court explained to the offender in ordinary language his liabilities under Article 28B and 28H of Chapter 9 of the Laws of Malta if he fails to comply.

Having seen the appeal application presented by Konstantin Alexander Anastasiou in the registry of this Court on the 23rd of March 2018 whereby this Court was requested to review and revoke the decision taken by the Court of First Instance being the Court of Magistrates Criminal Judicature of the 7th March 2018 as regards to the charges 1, 2, 5, 6 and 7 and to confirm the Sentence wherein it found the accused not guilty in terms of charges 4 and 5 and to actually find the appellant not guilty of the charges brought against him, that the Prosecution has failed to produce evidence that proves the charges and hence appellant should be absolved and freed accordingly from the sentence inflicted by the first Court.

Consequently this Honourable Court should declare the said judgement merit of this humble appeal as null and void on the charges 1, 2, 5, 6, 7 and consequently revoked in parte and to confirm the part of the judgement where according to charges 3 and 4 abstained and absolved the appellant.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appellant, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of Konstantin Alexander Anastasiou:

In the Appellants humble opinion the Prosecution failed to prove the essential elements of fraud as envisaged by law.

It was established from the acts and the documentation presented to the Court that there was a legitimate agreement drafted and signed between the appellant and Robert Tonna proprio et nomine and Joseph Schembri proprio et nomine.

The agreement stipulated various duties and obligations for the materialisation of obtaining a Bank Loan. The appellant was merely an intermediary with the Financial Institution that would finance the loan. The amounts involved in this case are indicative and legitimate amounts that were advanced freely to the appellant on the premise that he would facilitate the application to apply and obtain a Bank Loan.

The agreement was a regular agreement stipulating amongst other things the obligation of a regular insurance policy. All loans given out by financial institutions and Banks have this principal obligation and unless the applicant is duly insured, the Bank will not advance to process and authorise the loan.

It transpires from the relevant acts of the case that such amounts were actually advanced to the appellant in his role as intermediary and agent. A commission for his services was also provided for in the agreements and hence the borrowers were aware and actually acknowledged that they would in the process be paying a specified percentage amount to the appellant for his services. Both borrowers failed to make further disbursements and failed to honour their commitments in the terms stipulated in the agreement. Forthcoming and due disbursements were not effected.

The sequence of events leading the borrowers to opt to report the appellant to the Police was effected when the appellant was taken in custody and investigated on other charges of fraud relative to other borrowers which charges are still sub iudice and undecided. Hence accused is still deemed innocent until proven otherwise.

The borrowers instead of opting to proceed with the agreed terms and conditions opted to file the report to the police alleging fraud when in actual fact they voluntarily entered into the agreement appointing the appellant as intermediary to provide them with a Bank Loan from a foreign lending institution.

From the acts and documents of the case it was only proved that the appellant was acting through a Power of Attorney of the Investment Group and this investment Group was directed by a certain CEO Peter Kovac. No evidence was forthcoming in the case as to this entity when the prosecution was actually bound to bring forward that essential evidence.

The borrowers signed a Service Provider agreement with the appellant also agreeing to pay a 0.5 % commission fee for his services. Both borrowers failed to honour their commitment and failed to effect such due and undertaken payments.

As normally happens in loan facilities Bank normally require tangible assets and guarantees to cover the loan sum. The financial institution was considering the loan subject to the pledging and hypothecation of properties. The borrowers did not wish to hypothecate any such property although one of the loans namely that of Mr. Tonna was to purchase the same property from where he operated his business.

On hearing the accused now appellant had been arrested and investigated they opted to file a report to the police to attempt to absolve themselves from the obligations undertaken under the signed agreement.

Mr. Schembri confirmed to the First Court that the appellant actually reimbursed him of the amount of LM 800 from the Lm2,800 advanced until the date prior to his arrest. This shows that in so far as Mr. Schembri was concerned there was an understanding to actually reimburse the initial amount. In reality the arrest and incarceration in respect to the charges in a separate case certainly disabled the appellant from any business activity. Being in reprimand for several months pending his court case extended into several months severing all his connections with banks and commercial entities on whose behalf he was acting.

Hence the ground of appeal consists of the lack of mens rea needed to be proved beyond reasonable doubt that the appellant actually intended to defraud the borrowers.

It is humbly submitted that no such criminal intent was present in so far as the borrowers were concerned.

The requirements for the crime of fraud to subsist are actually those of four concurrent elements namely;

The crime contemplated in the charges was defined and outlined in the Judgement of the Court of Criminal Appeal by Judge Michael Mallia in the Appeal Case number: 225/2014 *Il-Pulizja (Spettur Yvonne Farrugia) vs Aaron Mizzi* wherein it was stated that for the fraud to be proved the prosecution must show that the four elements of the crime actually concur. That is the agent must have used

“Illi abbazi ta’ Artiklu 308 tal-Kapitlu 9 tal-Ligijiet ta’ Malta, sabiex jissussisti r-reat ta’ frodi jew truffa, jehtieg li jikkonkorru s-segwenti elementi: (i) in-ness bejn is-suggett attiv u s-suggett passiv tar-reat, (ii) l-element materjali konsistenti fl-uzu ta’ ingann jew raggiri, (iii) l-elementi formali li jikkonsisti f’dolo jew fl-intenzjoni tat-truffar u (iv) l-element ta’ dannu patrimonjali. Min-naha l-ohra, fir-rigward tar-reat ta’ frodi nnominata kkontemplat fl-Artikolu 309 tal-Kapitlu 9 tal-Ligijiet ta’ Malta, semplici gidba hija bizzejjed biex twassal ghall-kummissjoni ta’ dan ir-reat u l-messa in scena mhiex necessarja. Madanakollu, il-gidba trid tkun tali li twassal ghat-telf patrimonjali tal-vittma hekk kif rikjest mil-ligi.

*Illi fl-umli fehma tal-appellanti l-Ewwel Onorabbli Qorti ma ghamlitx interpretazzjoni korretta tal-element ta’ dolo hekk kif ikkontemplat fid-dispozizzjonijiet tal-Artikolu 308 u 309 tal-Kapitlu 9 tal-Ligijiet ta’ Malta. F’dan ir-rigward, l-insenjament tal-Qorti tal-Appell Kriminali fis-sentenza **L-Pulizija vs. Charles Zarb** deciza fit-tnejn u ghoxrin (22) ta’ Frar tas-sena elf disgha mija tlieta u disghin (1993) huwa car: Jigifieri biex ikun hemm l-element intenzjonali tar-reat ta’ truffa, hemm bzonn li ssuggett attiv tar-reat fil-mument tal-konsumazzjoni*

tieghu ikun konxju ta' l-ingustizzja tal-profitt u b'dan il-mod il-legittima produttivita tal-profitt hija bizzejjed biex teskludi d-dolo. (enfasi tal-esponent)

The Appellant feels aggrieved by the decision of the First Court as he humbly feels that the elements of the charges under Section 308 and 309 of the Criminal Court were not actually proven as the Court did not evaluate the facts produced in the Case and arrived to the wrong conclusion that the crime subsists when the facts and evidence of the case show otherwise.

For the Crime as configured under the charges of the case the following elements must subsist;

1. The agent must have used the means these being those mentioned in Article 308 (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).
2. The agent's action must have led the victim to part with an object, the dispossession is with the victims consent.
3. There must be the intention of defrauding another with the intention of making an unjust gain.
4. Finally an actual unjust gain must have actually been made.

In the case decided on the 31st July 1998 per Judge Patrick Vella the Court of Criminal Appeal (Inferior) *Police vs George Manicolo* it was affirmed;

"Sabiex jissussisti r-reat ta' truffa mhijiex bizzejjed is-semplici gidba, il-kliem menzjonier, izda hu necessarju u essenzjali li jkun hemm ukoll l-apparat estern li jaghti fidi u kredibilita' lil dik il-bidba. Dan l-att estern jista' jiehu diversi forom, kultant anke att teatrali. Irid ikun att, jew atti, li jimpressjonaw bniedem ta' intelligenza u prudenza ordinarja u normali, ghandhom ikunu atti frawdolenti li necessarjament iqajmu sentimenti kif indikat fl-artikolu 308 tal-Kodici Kriminali. Minbarra l-gideb irid ikun hemm l-ingann, ir-raggiri jew is-simulazzjoni li jwasslu

sabiex il-vittma jemmin jew ikollu fidi f dak li qed jigi lilu mwieghed mill-frodatur. Dan l-ingann, ghalhekk, ghandu jkun akkumpanjat b'artifizji. kwazi teatrali, u mhux semplicement wegħdiet, promessi u kliem semplici: Ir-reat ikkontemplat fl-artikolu 309 tal-Kodici Kriminali huwa kompriz u involut f dak ikkontemplat fl-artikolu 308 ta' l-istess Kodici. Dan johrog car minn interpretazzjoni akkurata ta' l-artikoli 308, 309 u 310, kif ukoll fuq l-iskorta tal-gurisprudenza in materja."

From all the evidence produced by the prosecution none of the elements concur and the prosecution failed to produce evidence that could be remotely indicate that the appellant was lying or attempting to deceive the parties seeking his assistance. To the contrary the acts contain regular commercial contracts acknowledging a regular commission due to the appellant with duties and obligations binding the parties.

From an examination of the acts of the case one examines the following evidence produced that can be synthesised under the following witnesses;

1. Inspector Paul Vassallo
2. Inspector Ian Abdilla
3. Robert Tonna – Dragon Limited
4. Joseph Schembri – Vanir Co Limited

The Ground of Appeal Due to Lack of Evidence supporting the Charges.

The appellant humbly submits that the First Court has on the acts and evidence produced in the Case arrived to the wrong conclusion and to this end it shall be pertinent to this Honourable Court to review the acts of the case accordingly wherein it should conclude beyond reasonable doubt that there is lack of evidence that in any manner amounts to the degree of evidence required to find the accused guilty as charged.

Folio 13 of the acts – Inspector Vassallo confirms that they made a search warrant on the 12th March 2004 in Wardija where accused was residing as Inspector Abdilla was investigating the accused on an activity of loans being offered.

Folio 14 – Inspector Vassallo confirms that evidence found was related to a company Worldstar International Services Ltd. He confirms that the Police did not find the name of Mr Anastasiou. He confirms it was a Maltese Registered Company Hillestead and a nominee Service Company - Yac Tacs Services and Selective Investments Limited that was found but nothing associated with the accused.

Folio 16 – Interpol Vienna – Request from International Authority. With respect the fact that Local authorities exchange request for information on an accused is no proof to support the charges. In fact the Warrant was retrieved and to date as one can confirm from the evidence produced or not produced by the prosecution no Warrant is yet in vigore. The accused remains and hold an absolutely clean conduct certificate locally and abroad (**verify Dok 4 at folio 43 of the acts**) and all Foreign requests or warrants where in fact retrieved and recalled. The prosecution failed to inform the court that such warrants where recalled and closed although such formal acts were received by the Attorney General and Police Authorities and also filed in separate proceedings namely in the acts of the case Police Supt Ian Abdilla vs Konstantin Anastasiou presided by Magistrate Dr C Herrera still sub iudice.

Folio 19 – The accused confirmed to the investigating officers that he was acting as a go between for a company based in Slovakia and Maltese entities.

The Robert Tonna Dragon Ltd Charges

Of certain importance is the Document filed in the acts of the case at folio 53.

With regards to the charges related to Robert Tonna and Dragon Ltd this document at folio 53 is an Agency Contract. With respect the agreement consisted of crucial evidence which was not considered by the First Court. The said Agreement clearly states that the parties are Robert Tonna and the Mandatory for Company Consult. This agreement confirms the legal relationship between the parties and is certainly a legal instrument binding both the alleged victims and the accused. As a fact the agreement has rights and obligations and the consideration exchanged as to the amount of Lm 11,000.00 is strictly governed by the said agreement. There is no

element of fraud as detailed in the charges that envisages any wrongdoing by the accused and as such any pendency relative to paid amounts should be construed as intended by the parties in this agreement.

Folio 56 and 57 actually depict the Insurance Policy Proposal that was a requirement listed as an obligation in the said agreement. At folio 96 Robert Tonna confirms he paid Lm5000 and the Lm 6000 was *"l-ewwel pagament tax-xahar tal-premium."*

This contrary to what the First Court might have considered and concluded shows that there was an unequivocal understanding set in the agreement that the loan would be processed and considered upon the second party Robert Tonna fulfilling the completion of a regular Insurance Policy. As we all certainly agree Bank Loans by Banks and Loaning Institutions all require an insurance Policy covering the borrower in case of death or otherwise for the full reimbursement of the loan so it was certainly regular and due to apply and proceed in such a manner as stipulated in the Agency Contract.

At Folio 103 Robert Tonna confirms *"iffirmajt agreement quddiem iz-zewgt (2) itfal tieghu li ghandhom 21 u 29 sena. U dawn spjegawlek fejn ma kontx qed tifhem. Cara iva le cara."*

Robert Tonna actually confirms he had requested a loan from a local Bank but this was declined as the Maltese Bank asked for a 50/50 payment/loan u jghid *"jien ma kellix Lm15,000.00 li talabni "*. Hence the parties agreed to payments on account with a full intention that when the premium for the insurance would be settled they could proceed to process the loan.

Folio 93 Robert Tonna testified on the 22nd March 2004. The accused was taken in custody and kept arrested under preventive arrest for several months following the above mentioned court case until he was released on bail months later.

The First Court fails to consider that the agreement in place between Robert Tonna and the accused was actually stalled by the accused being arrested. The alleged victim Robert Tonna did not in fact report to the Police but was actually spoken to

and asked by Inspector Paul Vassallo to recount his dealings with the accused. No formal request, no formal report and hence no formal evidence that the said Robert Tonna had been deceived and defrauded.

Infact folio 104 further confirms this as is clearly stated; Asked by the defence Robert Tonna States ; *“ Xi kawza Civili kontra s-sinjur Ghamilt? Le Ma Ghamiltx.”*

The appellant results from the evidence produced as a legitimate intermediary operating under a legitimate Agency Contract acting as intermediary to facilitate a legitimate Bank Loan. Being arrested and denied bail he could not be answerable in any manner for failing to proceed on his mandate. The said Robert Tonna was certainly aware he was under arrest and actually the acts confirm he had no intention to report the appellant. Being called by the police he was actually induced to declare the state of affairs relative to the loan application. He had never alleged that the appellant had denied him anything in terms of the agreement and it is evident from the acts that he did not come forward out of his own free will but because he was called by the police querying on the matter.

This evidence is certainly short of the evidence required to support the charges of the prosecution in terms of Article 18, 308, 309 and 310.

The Joseph Schembri - Vanir Co Ltd Charges

With respect to the fraud charges relative to Joseph Schembri it is humbly submitted that the charges have not been proven in terms of law and the First Court was incorrect to find the accused guilty with such charges as it failed to consider the evidence produced in the case.

The relationship between Joseph Schembri and the appellant was in reality rather different than that of Robert Tonna as he was not strictly a client and the accused had not even entered into an agency or mandatory agreement.

What really results from evidence in the acts is a scenario where the appellant and Joseph Schembri were actually in business together in various commercial activities.

Folio 106 of the Acts – Joseph Schembri actually confirms on oath that *“The deal was obtaining a Bank Guarantee to get a loan from BOV Bank Malta and I paid LM2800.00. It was a 0.05 % of the charges basically and another 0.05 % as soon as loan is issued.”*

In fact Joseph Schembri exclaimed *“As Yet No”* this is sound evidence that the loan was in progress. In fact the Court heard evidence from Joseph Schembri confirming that a meeting at Bank Of Valletta BOV Branch in Zejtun with Manager Mr. Bertu Pace the said Joseph Schembri and Mr Josef Schumutlack who came from abroad representing the foreign Company. This meeting was actually held and Joseph Schembri confirms it.

This evidence shows that all was in progress.

Folio 100 Joseph Schembri states;

“ I was supposed to meet Tinos 2 days later on Friday basically to fax all necessary documents and a draft of the contract of the company abroad and Friday afterwards I could not contact him as he was arrested “

The appellant humbly submits that this certainly confirms that there was no complaint by Mr Schembri hence the necessary element for the charges to constitute fraud in terms of the articles of the charge do not exist. The said Schembri did not deem the amounts advanced ever to be taken illicitly by the accused.

Folio 109 – *“Company Consult wants to issue Bank Guarantee and we agreed with the Bank Manager that it could be one of the conditions set by the company abroad in a bank to bank guarantee and BOV would take care of it. In fact I did not purchase an insurance.”*

Folio 110 - *“So basically the guarantee arrived and one of the conditions in the guarantee will be that I would have a life insurance policy for the amount.”*

Asked by the prosecution; *“For those, the point five per cent (0.5%) of charges that you paid out, did you receive any paperwork?”*

"Yes, I had a contract from issued, my lawyer drafted a contract which we signed together"

Asked by the defence *"Did you ever lodge a report with the Police?"*

Joseph Schembri answers: *"NO"*.

"So am I correct to say that Mr Vassallo sent for you"

"YES"

"No my lawyer Drafted the Contract"

"And out of the money that you paid he sort of loaned you back the two thousand"

"He loaned me back the two thousand euros so that I can continue this operation"

In the appellants humble opinion Joseph Schembri confirmed on oath he was reimbursed an amount and was loaned the remainder. Hence the charge could not have ever materialised as Joseph Schembri willingly paid what he paid and the appellant actually reimbursed what Mr Schembri requested. There was absolute trust between them and no deceit as can be attested by the evidence in the acts. Actually Mr. Schembri drafted an agreement by his own lawyer and the appellant just accepted it. The appellant could not be attributed with any deceit in such sequence of events and facts.

What is more perplexing as to Joseph Schembri that continues to confirm that there was not only an agreement but a mutual trust between appellant and Schembri certainly far from the elements needed to prove the charges.

Folio 107 – Mr. Schembri affirms; *"I have business dealings with Mr. Anastasiou. I offered him 25% shareholding in this Company for a guarantee of 1.2 million euros because we have a project now, we are in process of buying a vessel to expand business"*

"I paid LM2800 as 0.05 % as charges."

He confirms that a meeting at BOV Zejtun ensued and this shows that all dealings were above board, real and concrete as no Bank Manager would entertain such an

application had they not shown that parties were proceeding in a correct commercial behaviour.

The First Court unjustly failed to appreciate the real state of affairs as transpire from the evidence and facts in the case as in reality it should have realised that the appellant is actually a victim in this case. His arrest and denial to be granted bail for a prolonged period of time was illegal and unjust and resulted in disrupting his otherwise commercial activity as a businessman. The trust gained as is clearly confirmed by Mr. Joseph Schembri was unjustly effected by the way the prosecution handled the case. There was no evidence whatsoever that they had in hand to justify the present charges and the evidence once examined does not only constitute unmistakable evidence that the appellant was acting in a legitimate manner but that his being charged was irregular as the prosecution definitely did not produce the required elements of the charges.

Testimony of the Accused

Folio 217 - 241. The accused chose to freely give testimony in the case although he need not and could have remained silent as the prosecution alone should prove its case. He took the witness stand and in detail recounted to the Court his activity, his efforts to establish contacts and assist businessman. The prosecution brought forward in a separate case reports filed by third parties who used the Criminal Procedures to elude payments and decline undertakings according to signed agreements. The accused was charged in a separate charge to this case and such is still sub iudice. None of the parties with whom he was doing business and had commercial agreements after 15 years has ever filed any judicial claim, any Civil Litigation lawsuit to claim any amount. This applies to Robert Tonna and Joseph Schembri also.

The First Court should have considered in a different light this fact which was drawn out in the acts of the case. Many success stories and successful business of the accused was not allowed or was not presented in this case and Police chose to charge the accused when they never had any evidence in hand.

A very crucial factor in this case is that practically all evidence was heard by the then Magistrate Dr Antonio Mizzi then elevated to Judge. Hence the First Court as presently presided was denied from the faculty of hearing the main two witnesses. It certainly could not appreciate the circumstance under which this case was brought forward by the prosecution. In this case no evidence was forthcoming to justify and find the accused guilty as charged and Prosecution simply proceeded on findings of another separate case. It goes a long way to understand why after 15 years pending the other case which was more complex in nature is still ongoing with foreign witnesses expected to testify.

All International Warrants including those from Vienna and Europol were subsequently retracted and the appellant relieved from any wrongdoing internationally. Had all these jurisdictions found any wrongdoing the accused would have certainly been tried or charged. No such prosecution was ever taken against him. The first Court was certainly unaware of the apprehension these Warrants had aroused in Malta leading the prosecution to prosecute when in reality these were regular business dealings, loan processing by licensed institutions and regular mandatory and agency agreements where the appellant legitimately introduced and acted in the interest of clients to act as intermediary and to facilitate Bank Loans.

In the case pronounced by the Court of Criminal Appeal on the 22nd February 1993 presided by Judge Carmel A Agius; *Police vs Charles Zarb* it was affirmed;

*“Ghar-reat ta' truffa hemm bzonn li tirrizulta materjalita' specifika li sservi ta' substrat ghall-verosimiljanza tal-falsita' prospettata bhala vera u b'hekk bhala mezz ta' qerq. M'huwiex bizzejjed ghall-finijiet ta' l-artikolu 308 tal-Kodici Kriminali affermazzjonijiet, luzingi, promessi minghajr l-uzu ta' apparat estern li jirrivesti bi kredibilita' l-ffermazzjonijiet menzonjeri tal-frodatur. Kwantu jirrigwarda d-dolo, irid ikun hemm l-intenzjoni tal-frodatur li jipprokura b'ingann il-konsenja tal-flus jew oggett li jkun bi profitt ingust tieghu. L-ingustizzja tal-profitt tohrog mill-artikolu 308 tal-Kodici Kriminali fejn il-kliem "bi hsara ta' haddiehor" ma jhallux dubju dwar dan. **Jigifieri biex ikun hemm l-***

element intenzjonali ta' truffa hemm bzonn li s-suggett attiv tar-reat fil-mument tal-konsumazzjoni tieghu jkun konxju ta' l-ingustizzja tal-profitt, u b'dan il-mod il-legittima produttivita' tal-profitt hija bizzejjed biex teskludi d-dolo."

It is clear that the evidence of the case does not have any material evidence that shows that the appellant actually had any mens rea at the time he concluded the agreement with Robert Tonna and with Joseph Schembri. His full intention was to assist them with obtaining the loan and the agreements signed envisaged that he would be rewarded by a 0.5 % commission of the loan for his services which sums would be much greater than the Lm 11000 and the Lm2500 involved in this case. It amply results that his arrest actually disabled him commercially and disabled him from persevering to fully assist them in finalising the loans.

Criminal Proceedings

The Prosecution opted to produce these charges not because Tonna and Schembri filed a report or wished to take any action on the appellant. The acts confirm this without any reason of doubt.

Tonna was made to feel apprehension and did not wish to be involved in the proceedings and this is a legitimate reaction as no businessman would like to be associated with a person charged with fraud and kept in reprimand pending proceedings. This however could not be interpreted as evidence to any crime. Robert Tonna had appointed to assist him in this Loan and financing procedure Kreston – Paul Marmara and Dr David Griscti a lawyer specialising in finance and tax and hence no doubt should have been given to the fact that the signed Power of Attorney and Agency Agreement between the parties was a legitimate one. It followed after several meetings held in Sa Maison Offices of the same Tonna who was always assisted by his accountant and the said Attorney. These both discussed and corresponded at length with the foreign Investment Company that being Company Consult represented by Peter Kovac. All these aspects to the case actually confirm the correctness of the dealings and involvement of the appellant and should have never being considered in a bad light by the First Court. The reality of the issue was

that once the appellant was kept arrested Robert Tonna opted to backstep, a natural reaction in such cases and also wished to avoid paying any due commission according to the signed agreement which would have amounted to around 250,000.00 not the initial 11,000 advanced to appellant under the signed agreement.

As to Joseph Schembri and Vanir Company Limited the scenario was not that of client and agent but more than that, he was a strict friend and collaborator. The accused as transpires from the acts of the case was rather wealthy holding three very luxury cars in Malta. The said Joseph Schembri in fact assisted the appellant to obtain his bail conditions and fork out the bail deposit. The Rolls Royce worth around 375,000.00 was physically in Malta and used to be placed as a guarantee to fund the bail deposit of around 50,000.00 placed in the Maltese Court Registry in observance of the hefty bail conditions imposed. The assistance of Joseph Schembri in the matter was instrumental and such fact should have been considered in confirming that Joseph Schembri never had and did not wish any prosecution for the accused as he continued to assist the appellant throughout. This certainly is not the scenario and none of the material elements of the charges configure in such circumstances and facts.

Lapse of Time in The Defence of The Accused

It is also another ground of appeal in that the First Court was denied the benefit of hearing the oral submissions of the defence lawyer of the accused by Dr Emmanuel Mallia who had made verbal submissions before the First Court as differently presided. The submissions were not transcribed and do not appear in the acts of the case for the presiding Magistrate to have reference of the defence. The change in the presiding Magistrate is not to impinge on appellant. This said the acts are characterized by various adjournments and no inference in a negative manner is being made to the fact that the First Court went forth to pronounce the Judgement of the 7th March 2018 as it is in the circumstance understandable that the case has been dragged for over 15 years. It is humbly stated that the accused wished to have focus on the other pending case were foreign witnesses keep on delaying the procedures

to attest his innocence and this present case as stated above in the grounds for appeal was evident and clear in that the alleged victims did not file any reports and were invited by the Police to witness against the accused to support the other case sub iudice.

Considers;

That the facts in brief are the following:

1. The Economic Crimes Unit was receiving information of a person of Greek origin who was offering large sums of money as loans to Maltese business men which loans never materialised;
2. Inspector Ian Abdilla testified that the Police had information that the person was 'Costantino Anastasiou';
3. Inspector Ian Abdilla testified that a complaint was received by Mr. Robert Tonna regarding monies paid to the accused in order for the accused to get him a one million Maltese Liri loan which loan never materialised. Mr Tonna had paid a total of LM11,000 to the accused;
4. The police also spoke to Joseph Schembri who paid LM2800 to the accused for the accused to provide him with a bank guarantee;
5. Charges regarding fraud to the detriment of Dragon Co. Ltd and Mr. Robert Tonna as well as charges regarding fraud to the detriment of Vanir Co. Ltd and Mr. Joseph Schembri were issued against the accused. Misappropriation charges were also issued but the First Court in the appealed judgment deemed such charges as alternatives to the charges of fraud.
6. The accused was also charged with committing forgery of documents, malicious use of false documents and of committing any other kind of forgery due to a number of documents found in the residence of the accused during the search;

7. The First Court found guilty of the charges of fraud as well as charges regarding forgery and making use of false documents. The appellant subsequently appealed the judgment.

The appellant in his appeal submits that the First Court was denied the benefit of hearing oral submissions of the defence lawyer of the accused by Dr Emmanuel Mallia who had made verbal submissions before the First Court as differently presided. The submissions were transcribed and do not appear in the acts of the case for the presiding Magistrate to have reference of the defence. That the change in the presiding Magistrate is not to impinge on the appellant. He submits that the acts are characterized by various adjournments and no inference in a negative manner is being made to the fact that the First Court went forth to pronounce judgment and that the case has been dragged for over 15 years. The defence submits that the accused wished to have focus on the other pending case were foreign witnesses keep on delaying the procedures to attest his innocence and this present case and according to the appellant, the victims did not file any reports and were invited by the Police to witness against the accused to support the other case sub judice.

From the acts it results that the Court that decided the appealed judgment was not presided by the Court that heard evidence. The Court considers that even though the Court that presided over the case was not the Court that heard the evidence, all evidence is transcribed. It results that during the sitting dated fourteenth (14th) of May of the year two thousand and twelve (2012) the defence declared that it has no further evidence to produce. Subsequently there was a change in the presiding Magistrate. It results that during the sitting dated the fourth (4th) of November of the year two thousand and thirteen (2013), the Prosecuting Officer and the accused declared that they are exempting the Court from the need to hear evidence given again. Furthermore, even though parties did not make oral submissions before the Court that decided the appealed judgment, the Court gave several opportunities for the parties to make oral submissions upon the request of the defence. It also results that when the Court on the twenty eight (28th) of March of the year two thousand and seventeen (2017) adjourned the case for judgment, neither of the parties at that

stage requested that oral submissions are made and neither of the parties requested the suspension of the delivery of the judgment for the purpose of making oral submissions or the filing a note of submissions. The appellant cannot therefore at this stage lament about this fact. This ground of appeal is therefore being rejected and the Court will proceed to consider the merits of the appeal.

According to the appellant, the Prosecution failed to prove the essential elements of fraud as envisaged by law. He submits that it was established that there was a legitimate agreement drafted and signed between the appellant and Robert Tonna proprio et nomine and Joseph Schembri proprio et nomine.

That the agreement stipulated various duties and obligations for the materialisation of obtaining a Bank Loan. The appellant was merely an intermediary with the Financial Institution that would finance the loan. The amounts involved in this case are indicative and legitimate amounts that were advanced freely to the appellant on the premise that he would facilitate the application to apply and obtain a bank loan. The agreement was a regular agreement stipulating amongst other things, the obligation of a regular insurance policy.

Amounts were advanced to the appellant in his role as intermediary and agent. A commission for his services was also provided for in the agreements and hence the borrowers were aware and actually acknowledged that they would in the process be paying a specified percentage amount to the appellant for his services. Both borrowers failed to make further disbursements and failed to honour their commitments in terms stipulated in the agreement. Forthcoming and due disbursements were not effected. That the appellant was acting through a power of attorney of the investment group and this investment group was directed by a CEO Peter Kovac. No evidence was forthcoming in the case as to this entity when the prosecution was actually bound to bring forward that essential evidence. The borrowers signed a Service Provider agreement with the appellant also agreeing to pay a 0.5% commission fee for his services. Both borrowers failed to honour their commitment and failed to effect such due and undertaken payments. He submitted

that Mr Schembri confirmed to the First Court that the appellant reimbursed him of the amount of LM 800 from the LM2,800 advanced until the date prior to his arrest. That in so far as Mr Schembri was concerned there was an understanding to actually reimburse the initial amount. He submits that in reality the arrest and incarceration in respect to the charges in a separate case disabled the appellant from any business activity. Being in reprimand for several months pending his court case extended into several months severing all his connections with banks and commercial entities on whose behalf he was acting. Hence the ground of appeal consists of the lack of *mens rea* needed to be proved beyond reasonable doubt that the appellant intended to defraud the borrowers. That no criminal intent was present in so far as the borrowers were concerned.

The appellant makes reference to the four concurrent elements for the crime of fraud.

The appellant also submits that the First Court has on the acts and evidence produced in the case arrived to the wrong conclusion and to this end it shall be pertinent to the Court to review the acts of the case accordingly wherein it should conclude beyond reasonable doubt that there is lack of evidence that in any manner amounts to the degree of evidence required to find the accused guilty as charged. The appellant makes reference to the evidence produced.

That the First and second charge regards the offence under article 308 and 309 to the detriment of Dragon Co. Ltd and Mr. Robert Tonna and to the detriment of Vanir Co. Ltd and Mr. Joseph Schembri respectively.

Considers;

That the Court in the appealed judgment declared that it will not take any cognisance of the statement released by the accused to the police dated 13th March of 2004 and exhibited as document 8 at folio 84 et sequitur. In view of this, this Court will not make reference to the statement and any reference by witnesses to what the accused might have said during the investigation, during the search at his residence and during the statement is also inadmissible.

Inspector Paul Vassallo testified on the 22nd of March 2004 and explained that *'On the 12th of March, 2004, we executed a warrant that was granted to us by Magistrate Lofaro and we performed a search at the residence of Mr. Anastasiou in "Casa San Frangisk", Church Street, Wardija, where we effected a warrant against Mr. Anastasiou, against his girlfriend Linda Gilhova and his mother Ermelinda Yachx.'* He explained that *'While we were at the premises we seized a number of documents which were relevant to our investigation which I'm going to exhibit to the Court in due course. Namely these were linked to the investigation at hand. What we found was documents to a company called "Worldstar Intermediary Services Limited", to a company called "Worldstar Intermediary Services", to a company called "Worldstar Intermediary Services Limited". When we looked at the persons involved in "Worldstar Limited" we do not find the name of Mr. Anastasiou, nor do we find the name of a certain Mr. Palle Stevens. What annoyed, rather not annoyed us, what caught our attention was the fact that these documents that I'm going to exhibit were next to a fax machine, they were being faxed off, but the signature of Palle Stevens was cut out, it was a photocopy that was attached to the document near the fax machine. Also you'll note that there are other documents where the signature has been cut out and to different persons under different formats. Mr. Stevens here is listed as a Director, it's written as if in Italian, "Director di Economics", pero' Mr. Stevens does not appear on the directors list of this company.'* It is a Maltese registered company. The Inspector stated that he thinks that the directors are *'Hillestead and a nominee service, I think it's "Yac TACS Nominee Service".'*

He explained that *'in the same file of papers that were near the fax machine we found an HSBC document, an HSBC statement, an HSBC electronic statement that is sent to account holders occasionally where this document has had alterations made to it in biro. There were three (3) documents, two (2) were in colour and one (1) is in black and white. The Court will note that the top cover was the original statement which had a number altered, the second appears to have come of a fax machine because it has been copied or scanned because there's a line through the paper, and the third copy, which has no alterations to it, but carries all the facts that were altered and top copied, and was send from a hotel to Mr. Anastasiou it appears. The sum appears to have been from five hundred Maltese Liri (LM500) to seven thousand five hundred Maltese liri (Lm7, 500) or Euros, because then there's also where the*

denomination is on the documents as Mtl., Maltese Liri, there's also behind this sign EUR, which is the denominator for EUROS.' He testified that '...we also found a list of papers that had been sent to him from a company called "Selective Investments Limited" whereas Maltese persons had been interviewing proposed clients on behalf of Mr. Anastasiou, and there are the comments that they had sent and report where applicable to Mr. Anastasiou about the clients they had interviewed.'

Regarding Mr Tonna, he explained that 'The gist of the matter was that Mr. Tonna had been approached by Mr. Anastasiou to loan him some money, to get him a loan, as business loan to be able to buy outright the premises that he runs at the moment in Sa Maison and Mr. Tonna told us that he had needed five hundred thousand Maltese pounds(Lm500,000), but Mr. Anastasiou also told him that he was not able to get the sum because his minimum was one million Maltese liri (Lm1,000,000), so they went about setting up a deal for one million Maltese liri (Lm1,000,000). It also transpired that later on, after all this has been done, Mr. Anastasiou told Mr. Tonna advanced money to mr. Anastasiou and when he added up the sums of money he had advanced to Mr. Tonna had not received an insurance policy or any idea or any indication that his money had been passed into an insurance company for any reason. Mr. Tonna also provided the Police with a set of documents, which I'm going to exhibit to the Court, including receipts, two receipts from Mr. Anastasiou for money received of five thousand (LM5,000) and six thousand (Lm6,000), which made eleven thousand (Lm11,000), the sum that I spoke about.'

He explained that 'we also spoke to a Mr. Joseph Schembri from Hamrun. Mr. Schembri owns a tourist, a company that provides services, holiday services, such as boat rides, tourist trips and that sort of business, and he was trying to buy a boat. For the boat he required a sum of money - I think it was in the region of one hundred and ten thousand Maltese liri (Lm110,000) - and Mr. Anastasiou told him that he could not get him such a low sum, because his sums were always, he could not a certain level, but he could provide a bank guarantee for Mr. Schembri in EUROS, that he was providing him a bank guarantee he would have to insure himself against the loss of funds, so for this insurance policy Mr. Schembri gave Mr. Anastasiou the sum of two thousand eight hundred Maltese liri (Lm2,800). I also understand that during our investigations, or rather just before our

investigations, Mr. Anastasiou also returned some of those funds to Mr. Schembri.' He explained that 'I would like to point out that during the search we found no references to any insurance companies in Mr. Anastasiou's home. We also noted that despite, rather further to the fact that he was known to other countries for fraud, he possessed no credit cards, we haven't found no cash in the house...' He explained that *'So then again, we had not seen any money at all. And another point is the fact that for all these business activities that Mr. Anastasiou is supposed he deals mainly in cash, during our investigations we also received information from the Financial Intelligence Analysis Unit to the extent that Mr. Anastasiou has not bank accounts here in Malta and that his cash comings and goings are mainly effected through exchange bureaus, so there is no major transaction of cash at all....'* He explained that *'During the conversation with Mr. Tonna, he stated to us that Mr. Anastasiou told him that he would take care of the Central Bank issue...'*

In cross-examination, the Inspector stated that the accused has rented property in Malta. He has three vehicles, an Aston Martin and two Jaguars. They are temporarily imported to Malta, not registered here in Malta. He was mainly asked about the statement of the accused and about what the accused had stated. The Court will therefore not make reference to this in view that the First Court in the appealed judgment had declared the statement released by the accused as inadmissible.

Robert Tonna testified on the 22nd of March 2004 who explained that *'Jiena avvicinani Anastasiou fejn qalli illi qed jaghti l-"loans", jiena kellimtu, ghidtlu li ghandi bzonn ta' hames mitt elf (Lm500,000), qalli "Le, l-inqas miljun (Lm1,000,000).'* *Sewwa? Ghidtlu "All right" mela jien, ghax jien ridt nixtri proprjeta' izjed. Qalli "F'sitt gimghat ingibhomlok", illi ghaddew sitt xhur.'* He testified that it was Anastasiou that approached him. He thinks it was in October 2003. Anastasiou came to his house. The witness is the director of "Sa Maison Retirement Home". He explained *"Qalli li qed jislef il-flus li gejjin minn barra, jiena ma stajtix ingibhom mill-bank ghax bir-rati gholja u l-bank ried nofs u nofs u jiena issellifthom, ghidtlu biex niehu hames mitt elf (Lm500,000) u qalli "Le", qalli "l-inqas miljun (Lm1,000,000)", u jien ghidtlu "All right" mela, sewwa! Qalli li ridt inhallas hames elef lira (Lm5,000) biex jigbor xi karti, ir-ricerki fuqi u mhux fuqi, talabni xi karti u tajthomlu -'* He testified that *'Jien tajtu kollox, hu, tal-kumpanija, tat-*

taxxa, kollox tajtu, li talabni fuq il-kuntratt tajthomlu kollha. Talabni hamest elef lira (Lm5,000), ghax qalli dawn iridu jghaddu "through Central Bank", se jirrangali kollox hu, kollox hu, u mbaghad talabni s-sitt elef lira (Lm6,000) li huma ta' l-"insurance", il-"first premium", u tajthomlu wkoll.' He explained that 'Li qal hu li l-"insurance" se jgibhom mill-bank u ried jghaddihom lili "through Central Bank".' He confirmed that he paid LM6,000 'ta' l-ewwel xahar tal-"premium", u mbaghad nibda inhallashom kull xahar, sitt elef, sitt elef.'

The accused gave him a document in German and explained it to him 'qalli li hu sitt xhur, f'sitt gimghat ha jgibhomli u li rrid inhallas il-"premium", u kul ma kien hemm xi ismi, kunjomi, l-"I.D. Card Number", il-"Passport Number" u affarijiet hekk.' He testified that 'imbaghad qalli li jrit itini, irrid intih hmistax-il elf lira (Lm15,000) ohra. Ghidtlu "Dawn m'ghidlix bihom jiena.: Qalli "Skuzani ghax issa indunajt bihom".' Asked whether he gave these LM15,000 replied "Le, le , ma tajthomlux. Mela ha noqghod, mela jien "Christmas Father", hu!"

He testified 'Ghax jien qatt ma gabli xejn, hu. La gabli mill-banek ta' barra li hu hallas il-hamest elef lira (Lm5,000) jew is-sitt elef lira (Lm6,000), xejn. Dejjem nitlobhomlu u qatt ma tahomli.' He had given him the bank account number, 'iffeksjajtulu d-dar.' If not mistaken, he started meeting him in October 2003. He told him that the loan takes six (6) weeks to arrive.

Robert Tonna in cross-examination testified that the accused got to know the witness through George from Qormi who brought him. He explained that 'darba rajtu ghandu bl-"Austin Martin" tieghu u saqsejtu, u qalli "Dak jislef il-flus", qalli "Issa inkellemhulek". He asked him to speak to him. The witness does not speak clearly in English but understands 'mhux hazin'. The accused spoke to him in English and the witness had his children present. He signed that he gave him LM6000 and LM5000 and that he had to get him of the insurance. One child is 29 years old and the other 21 years. The position was clear. He had gone to a bank but was asked for fifty fifty. Regarding the LM15,000, the accused told him 'Rega' qalli biex jaghmlu "transfer" il-bank, biex ihallsu

mbaghad l-avukati u t-"transfer" minn banek ghal bank, hafna minn dawn l-affarijiet.' He did not file a civil law suit against the accused.

Joseph Schembri testified on the 22nd of March 2004 stating that *'I'm a Managing Director of my own company, "Valerio Company Limited", and I organise excursions and cruises for the tourism industry.'* The Police spoke to him about Mr. Konstantin Anastasiou. He explained that *'Basically I was having business dealings with Mr. Anastasiou. Basically I was having business dealings with Mr. Anastasiou which in return for a bank guarantee I was going, it was basically a business dealing that I offered twenty five per cent (25%) shareholding in the company for a bank guarantee of one point two million Euros, because we have a project now, we are in the process of buying a vessel to expand the business.'* He explained that *'the guarantee entailed a bank guarantee from one of his banks so that I can get a loan from BOV Malta.'* Asked if he got any guarantee, replied *'As yet no.'* Asked if he paid any money for the guarantee, replied *'We paid, I paid two thousand eight hundred (Lm2,800) approximately, equivalent, the equivalent of two thousand eight hundred Maltese (Lm2,800).'* Asked for what, replied *'It was a point zero five per cent (0.05%) of the charges basically, and another point zero five per cent (0.05%) as soon as the guarantee is issued.'* Asked if the guarantee has been issued replied *'As yet no. Last week, no, two weeks ago a certain Yousef - I don't remember his surname - Smutleff, something - came from one of his companies abroad, we had a meeting with my bank manager Bertu Pace from Zejtun Branch, BOV. Basically the meeting entailed coverage of insurance, a life policy for me in their name which he agreed with the bank it could be one of the conditions on the guarantee and also that the bank itself will take care of it. I was supposed to meet with Tino two days later, on Friday, basically to fax all necessary documents and a draft of the contract to the company abroad, and Friday afterwards I couldn't contact him as he was arrested.'* Asked if he received any of the LM2,800 back replied *'I had, a couple of weeks ago I had a problem with my cash flow, because I mean at this time of year my business is practically nil, so it's more of preparation for the following summer. I asked him, I told him basically that I had a problem with cash flow and he gave me two thousand Euros, the equivalent of eight hundred pounds (Lm800).'* These negotiations started in the beginning of December. That *'it was supposed to be ready by the end of the year, but he*

told me that, I mean he had problems abroad, that was some minor problems abroad, and it was basically extended, the termination date was extended I mean verbally between us.' That *'Basically it was week to week; these was no said date. I mean my interest was to get the guarantee and not the money back.'* He explained that *'As yet, as yet the guarantee hasn't come. Two weeks ago a person came from abroad, Josef Schmutlack I think his surname is, from Company Consult, as I said, we had a meeting with the bank manager, it was the day before you called me to your office. We had a meeting with Bertu Pace of Zejtun Branch to finalise what the bank needed for the bank guarantee, and also because one of the things that wasn't mentioned before was an insurance policy, my own personal insurance policy which the company wanted, Company Consult wanted to issued the bank guarantee, and we agreed with the bank manager that it could be one of the conditions set by the company abroad in the bank to bank guarantee, and the bank BOV itself would take care of it.'* He explained that *'I didn't purchase this insurance because as I said before, it's going to be one of the conditions, it was supposed to be one of the conditions. So basically the guarantee arrived and one of the conditions in the guarantee will be that I would have a life policy for the amount.'* He received paperwork regarding the 0.5% of charges he paid out. He had a contract, his lawyer drafted a contract which they signed together. He did not receive any paperwork from any other insitution. In cross-examination, he stated that he did not lodge a report with the police, Mr Vassallo sent for him and he went to the headquarters. His lawyer was not there when the agreement was signed but his lawyer drafted the contract which was acceptable to the accused.

Asked *'And out of the money that you paid he sort of loaned you back the two thousand Euros?'* replied *'He loaned me back the two thousand Euros so that I can continue my operation.'* At the bank himself, Bertu Pace the Zejtun Bank Manager, the Zejtun Branch Manager and Mr. Josef Smutleck were present.

Inspector Ian Abdilla testified on 14th April 2005 explained that *'I have received two specific complaints against Costantino Anastasiou namely the first one which was made by a certain Robert Tonna which is the owner of Sa Maison Retirement Home in Sa Maison whereby he informed the police that he had a project proposal worth something like five hundred thousand Maltese liri (LM500,000) and so that he could buy some adjacent property*

and set up a construction work to expand his residential home. He had been in contact with this Costantino Anastasiou whereby he was informed that the sum of five hundred thousand Maltese liri was not available and that Mr. Anastasiou could only offer him sums higher than one million Maltese Liri. Mr. Tonna had various meeting with Costantino Anastasiou and at one point he was informed by the same Anastasiou that in order for this loan to be granted he had to pay a sort of an insurance policy to cover the loan. This insurance policy had to be paid in advance which policy Mr. Robert Tonna paid in full amounting to eleven thousand Maltese Liri (LM11,000). Mr. Tonna informed me that the sum which should have been granted to him, which had been offered to him by Costantino Anastasiou, the loan of one million pounds of loan never materialized. Mr. Tonna also gave to the police all the documentation which he had in his possession mainly the receipts for the eleven thousand pounds made up of two payments, one of five thousand and the other of six thousand and all the contracts which he had signed and all the information which he had.'

He explained that 'I also received a second complaint, this time from a certain Joseph Schembri. Mr. Schembri has a tourist agency and he offers certain services like boat trips and other similar services and one of his lines of business was that of offering boat trips. He had the intention to buy a boat for this business which boat would have cost him round about one hundred and ten thousand Maltes Liri (LM110,00) and which this sum was not made available to him by the banks and subsequently he also got in contact with this Constantino Anastasiou whereby Mr. Anastasiou informed him that he could not give him this sum of LM110,000 because he only dealt with sums higher than one million but that he could offer him a bank guarantee for one point two million (1,200,000). Again Mr. Schembri was asked by Mr. Costantino Anastasiou to engage into a sort of insurance policy to cover this bank guarantee which insurance policy Mr. Schembri paid up amounting to two thousand eight hundred pounds (LM2,800). Again up to this date I stand to be corrected but this bank guarantee never materialized either.'

Among other information, Inspector Abdilla testified that 'Through MFSA we were informed that this sort of scheme is a sort of fraud scam known as cash advance fraud. Subsequently on the 12th of March 2004 after the necessary warrants of search and arrest were issued, if I am not mistaken by duty Magistrate Dr. Abigail Lofaro, a search was carried

out at the residence of Mr. Costantino Anastasiou situated at Casa San Frangisk, Church Street, Wardija. Various documents and various computer equipment were seized in particular we found documents pertaining to a certain Wordstar Intermediaries Services. We also found documents which had the signature of a Mr. Pale Stevens which signature had been cut off and glued to other documents. We have also discovered HSBC documents which had been altered and also we found certain links with a certain company by the name of Selective Investments Limited. I am in a position to confirm that the documents which have been presented by Inspector Paul Vassallo which are marked as document 1 which are found at folio 33 et sequitur, these documents have been found by myself and Inspector Vassallo together with our officers through out this search. I have to make note that document a folio 28 refer to the documents which have the signature of Pale Stevens attached or glued on these documents. There is also in page 31 and page 32 of the same document. I am also recognising document 2 which is made up of three pages from fol 34 to fol 36 which are documents pertaining to HSBC Malta Limited whereby there is an adjustment in the amount of the deposit whereby it is shown that instead of one thousand five hundred or five hundred Maltese Liri, there had been a deposit of seven thousand five hundred Euros. Again this documents were found in the residence of Costantino Anastasiou. Apart from that I am recognising document 7 which is found from a fol 51 to fol 58. These documents have been given to me by Robert Tonna which pertained to the case which I already mentioned which was reported to the police by Robert Tonna himself.'

Inspector Abdilla confirmed that Mr. Schembri lodged a complaint but does not recall whether he came voluntarily to lodge the complaint or whether they heard news of being a possible other victim and had been contacted by them but he came and was spoken both by himself and Inspector Vassallo. Mr. Robert Tonna was also spoken by himself and Inspector Paul Vassallo. It might be that Mr. Schembri might have expressed his views that he did not wish to lodge a complaint. It could be that he never lodged a complaint. He confirmed that from documents there are certain conditions which Mr Tonna explicitly bound himself to abide by and documents are signed by Mr. Tonna. Regarding the document issued by HSBC, he explained that the amount has been altered in ink. That it is in altered document.

PS 498 David Agius on the 15th of June 2005 testified that he is stationed at the Cyber Crime Unit within the Police Force. Inspector Ian Abdilla handed over to the Cyber Crime Unit two computer systems, four compact discs and three floppy discs on the 13th March 2004. Inspector Abdilla informed them that these were seized from the residence of Mr. Anastasiou Constantin Alexander at San Frangisk, Fejn il-Knisja, Wardija. The inspector requested them to analyse the computer systems, to browse documents that within them had a certain number of key words which Inspector Abdilla gave to them. From the hard disk drives and floppy disk it resulted that there were various documents and other data which was deleted but still within the hard disks that was related to the ongoing investigation. He made a report in which both copies of documents are present, with copies of emails located upon the computer system and also documents and deleted data that was present on the floppy disks and CDs. There is the hard copy of the documents related to the investigation. He exhibited the report as Document 9 and two towers, three floppy disks and four compact disks which are taped upon computer system one.

The accused **Costantin Alexander Anastasio** testified on 19th of October 2009. The Court will not consider where reference is made to what was stated in his statement which has been deemed as inadmissible. The accused testified that when he arrived in Malta in 2003 he was residing in a rented place in Wardija. He brought with him a substantial amount of furniture, cars, nearly all. He came with his family completely - his mother, wife, child and her family and her mother. His child was 3 years old at the time. He had companies in Malta. This was arranged for Mr. Alfred Manduca. Alfred Manduca was the brother '*of the lent, the one who was renting the place, were I was staying.*' He registered the Company through his office. The name of the Company he registered was '*SPQR and the name of the other company I think it was . . . Ltd. but I am not sure.*' He confirmed that he knows the Company Dragon Company Ltd. At the time he was the mandatory of a company called Company Consult which was an intermediary for banks and insurances. He was not a director, but was to represent the company and make acquisitions for new clients. He was an intermediary in the sense of mandatary. He confirmed that he was authorised to sign

agreements for this company, *'Yes to the power of attorney and then they were electing me as a . . . situation. I was not in the company as a shareholder, but the chairman of the board of directors and this was even printing of the visit card as well. On a NHC visit card was printed Chairman of the Board of the company.'* The person representing Dragon company limited is Robert Tonna. He was preferring to get refinancing for his property, a house for old people in Inside. He needs *'foundings'* for construction development and to repay some debts that was on this property itself. He told him that he went to the bank and refused.

Asked what they discussed together, replied *'To bring him facility, . . . and partners. After he did reach his standard, after his papers had checked with the company.'* Asked whether he was getting these facilities or from company consult, replied *'No, the company consult obviously because otherwise it would be a conflict of interest if I would make this . . . situation. If I am signing the agreement on behalf of company consult, I cannot offer a private service. It is only obviously on behalf of the contracting partner, the company abroad.'*

Regarding fol 53, he explained that *'The contract to secure the both interest and permissions as well as the situation about verification of documentation what the partner delivered.'* The signature is on every page which he with reference to the other party signed too. The person that introduced the gentleman was making services for his cars. His name is George Muscat. Asked if *'this man kept on air the contract, what was written there? The agency contract?'* replied *'No.'* He explained that *'This I do not know because we remind him even from abroad a couple of times but he was even arranged people from the insurances he would should have concluded the deal because the founding should be covered with insurance policy because obviously the property was mortgaged to another bank and we could not do it, we need to repay first the bank and then take the property as a collector real and an intermediate situation was arranged an insurance from Austria, but it was very interesting he knows weeks before that the person form insurance directly comes here. Because I was an intermediary, I was arranged from Austria the person. And he knows that this is to pay right, and there was an additional amount to pay and he was filing another report to the police. When the person from the insurance was here, . . . obviously because I*

was on the same time arrested when this insurance broker, not even the insurance broker, the contracting and the . . . was ready, was here in Malta. Obviously so the situation I lost the contact of the man, because he left, I do not know.' He explained with reference to Robert Tonna that he had to pay certain amounts, for a valid insurance. He did not pay these amounts so was in breach of the agreement. He could not continue with the conditions of the agreement if he did not pay, there must be reminders as well from abroad, reminders for him to pay. He never paid. He only paid an amount concerning the checking for documentation. He paid the insurance amount for a certain period but not all of the amount. The accused did not get any money out of it.

The accused does not know whether Schembri ever went to the Police, maybe the Police went to him. He confirmed that he testified that he does not have a 'pretention' against him. Schembri did not make a claim against him. He thinks Dragon Company Ltd made a claim against him with the police, he does not think there are any civil proceedings where Dragon Company Ltd sued him. The company abroad was filing something against them.

He used his name. Asked if he assumed any false designation, if he introduced himself as something he was not, replied *'The police was saying that I was printing visit cards that was written: chairman of the board of directors. But I was really, there was no . . . for this, but I was not a shareholder. That is right, this was always on the visit card printed. And the same company obviously was the intermediary.'* He had the authority to do that.

When they signed the agreement with Dragon Company Ltd, the business man came with his lawyer to sign the agreement. The accused did not force him to sign that agreement *'he was forcing me in fact. He was running after me.'* The accused did not force him to sign. He came with his lawyer for this agreement, the lawyer was present all day.

Regarding Joseph Schembri, he confirmed that he thinks he had a company, Vanier Company Ltd. He got to know Joseph Schembri through Mr Dunstan Williams. Joseph Schembri initially wanted to release, lease and refinancing for a touristic acquisition for a ship, for a boat. Joseph Schembri did not make any allegations

about him. When he signed the agreement as a mandatory, he had the power to sign it. He showed a copy of this to the police. *'Mr. . . . from the company came as well to declare my income in Malta.'* The company was paying him for costs.

The accused stated that he paid 4000 or 5000 euros per year for rent for the villa in Wardija. Regarding Joseph Schembri, the *'amount was repaid because I could not do or conclude this work and I told him I cannot do this and for the services there was nothing to re pay but I as a gentleman the agreement was doing this. Yes. Because he signed something that this was not refundable, funds for . . . but it is normal, even if you to go to a lawyer, you pay for entering the money. You cannot say if you do not concluded on the Court, the funds is to re pay. It is clear, everybody is working on the . . . situation but nobody makes nothing for free, especially int he business. It is impossible. That is impossible.'* He stated that *'I was receiving money from Maltese, from these two (2) people on behalf of . . . partners. On behalf, not from myself directly.'* He stated that he was being stolen while arrested. He lost an Aston Martin and 1 Rolls Royce. There were two international arrest warrants in Austria.

He confirmed that Mr Briffa never testified in these proceedings. In his testimony asked about the agreement with Dragon Co Ltd or Mr Tonna, he confirmed that he signed this agreement as a mandatory of a foreign company. Mr. Tonna did not honour his agreement so the agreement could not continue being processed. He explained *'opposite to his mistake there should be a free to pay, right, and so he is not conclusion of his conditions if he could not be paid, then he should pay the company. As a default.'* The initial fee was for the conclusion of the work but the work could not be concluded because he was from his side making a default. He should be obliged to pay damages to the bank and to the intermediary.

In cross-examination, the accused explained that *'Company Consult is a slower enterprise that is in Bratislava since two thousand and two (2002) I think and the shareholder is a certain Mr. Deiderfisher and Peter Covach.'* Reference was made to the search in his residence and documents found marked as Doc. 1 by the Court at fol 26 and 27, 28, 29, 30, 31, 32 and 33. Reference was made to a signature cut and pasted

on other documents. He confirmed that a document had a signature cut from it and from foglio 27 then subsequently pasted in various other documents. Asked why was this happening replied '*. . . documentation, the . . . companies were for . . . two thousand three (2003) or something.*' Asked '*How did they finish next your computer in your desk?*' replied '*Was making this company a statement against me. What is the way to do this case. I do not think so. Then I will ask me this.*' The Prosecuting Officer stated '*You cannot not answer this question.*' and the accused replied '*I think so yes. They was making a statement and not ask you this now. They was making a statement Mr. Inspector.*' He said '*These people was making a statement. I am just asking about it because my son, he was*' He confirmed that it was his son who did it. He confirmed that they were receiving money from Maltese Companies. Asked whether he ever got any funds for any client here in Malta replied '*How can I get it if you arrest me always before?*'

In re-examination, asked whether Mr Tonna had to receive funds till that time that he was not paying, replied no. That Mr Tonna signed the agreement out of his own free will and had a lawyer to advise him. The lawyer was Mr. David Grixtri from Marco Mifsud's office. The defence lawyer suggested that it was from Marco Chetcuti's lawyer.

Considers;

The Court will make reference to the essential elements of the crime of fraud in terms of article 308 of Chapter 9 of the Laws of Malta. In the case in the names '**II-Pulizija (Spettur Maurice Curmi) Vs Marjanu Zahra** ta' 63 sena iben Guzeppi u Anna nee' Cutajar imwield Birzebbugia fit-8 ta' Frar 1948 u joqghod "Margrace" 15, Triq Angelo Borg, Qormi, detentur tal-karta ta'l-identita numru 211248(M)¹', the Court considered that:

'Biex jissussti ir-reat tal-frodi jew truffa gie ritenut kostantement fil-gurisprudenza u fis-sentenzi tal-Qrati taghna illi jridu jinkonkorru diversi elementi. Ibda biex irid ikun hemm ness bejn is-suggett attiv u is-suggett passiv tar-reat u cioe' bejn min qieghed jikkometti ir-

¹ Decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 2nd March, 2011 (Number: 327/2007)

reat u il- vittma. Hemm imbaghad l-element materjali ta' dana ir- reat u cioe' l'uzu ta' ingann jew raggieri li jwasslu lil vittma sabiex issofri it-telf patrimonjali. Finalment huwa necessarju li jkun hemm l-element formali tar-reat konsistenti fid-dolo jew fl-intenzjoni tat-truffatur jew frodatatur li jinganna u dana sabiex jikseb profitt jew vantagg ghalih innifsu. Jekk xi wiehed jew iktar minn dawn l-elementi huma nieqsa, allura ir-reat tat-truffa ma jistax jisussisti. Illi f' sentenza moghtija mill-Qorti ta' l-Appelli Kriminali (per Imhalled 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 il-mod ghar-rigward ta' dana ir-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 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 hlied ghal xi kelmiet insinjifikanti ghal Kodici Franciz (artikolu 405) avolja dan, il-Kodici delle Due Sicile, it-truffa kien sejhilha Frodi”. Skond guriprudenza kostanti, l-ingredjenti 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 fir-rapport 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-negozju 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,

g. jew ta' hila

h. setgha fuq haddiehor jew

i. ta' krediti immaginarji jew

j. sabiex iqanqal tama jew biza dwar xi grajja kimerika, cjagħmel qliegħ 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-artifizzji 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 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 mensioniera 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."*

Għar-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 tal- falsita prospettata bhala vera u b'hekk bhala mezz ta' qerq. Ma huwiex bizzejjed ghal 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 taghti protezzjoni specjali kontra l-ingann li jkun jirrivesti dik il-forma tipika, kwazi teatrali, li tissupera il-kawtela ordinarja kontra s-semplici u luzingi, u li taghti li daww 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. L-ingustizzja 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 filmument tal-konsumazzjoni tieghu ikun konxju ta'l-ingustizzja tal-profitt u b'dan il-mod il-legittima produttivita tal-profitt hija bizzejjed biex teskludi d- dolo."

Illi minn dina l-esposizzjoni maghmula mill-Qorti ta'l-Appell li iccittat diversi sentenzi ohra tal-qradi taghna jidher illi l- elementi rikjesti sabiex jisussisti ir-reat tal-frodi baqghu invarjati fi-zmien.

Illi f'sentenza moghtija mill-Corte di Cassazione Penale gie deciz illi element ewelieni fir-reat tal-frodi huwa "l'elemento del danno patrimoniale" Biex imbaghad jissusti dana it-tip ta' reat huwa necessarju illi jezistu "I tre momenti di cui si compone il reato e' cioe' 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 ta'l-Appelli Kriminali (Il-Pulizija vs Patrick Spiteri deciza 22/10/2004) : "L'agente ... deve volere non solo la sua azione, ma anche l'inganno della vittima, come conseguenza dell'azione stess, la

disposizione patrimoniale, come conseguenza dell'inganno e, infine, la realizzazione di quell profitto che costituisce l'ultima fase del processo esecutivo del delitto. Naturalmente occorre che la volonta 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."

Illi l-artikolu 309 tal-Kapitolu 9, imbaghad jikkontempla ir-reat minuri tal-frodi 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- Puliizja 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 l-ohra (il-vittma) taghmel jew tonoqs milli taghmel xi haga li ggibilha telf patrimonjali bil-konsegwenti arrikkiment ghal min jghid dik il-gidba u basta, s'intendi li tkun effettivament waslet ghal dana it-telf min-naha u arrikkiment min-naha l-ohra."*

Illi ghalhekk mill-fattispecje ta' dana l-kaz il-Qorti trid tara jekk jezistux l-elementi legali rikjesti ghar-reat tat-truffa. Illi minghajr l-icken dubbju jirrizulta illi l-imputat bil-mezz ta' ingann u uzu ta' dokument illi huwa kien jaf ben tajjeb li kien falz irnexxielu jikseb fuel li ma kienx intitolat ghalih sabiex b'hekk huwa arrikkixxa ruhu u dana ghad-dannu tal-Water Services Corporation li spickaw kellhom ihallsu ghal fuel li ittiehed indebitament mill-imputat. Illi l-Qorti ma tistax taqbel mad-difiza illi dana il-kaz ghandu il-fattispecje tar-reat tas-serq u dana peress illi l-imputat ma huwiex qed jiehu ad isaputa tas-sid l-oggett, izda qed jadopera mezzi u cioe' 'l hekk imsejjaha artifizji sabiex jinganna u jiehu l-fuel li ma kienx intitolat ghalih. Fil-fatt fil-maggior parti taghhom jirrizulta illi l-vouchers ipprezentati mill-imputat kollha gew imhallsa mill-Korporazzjoni. Illi f'dana il-kaz hemm l-applikazzjoni ta'l-artikolu 310(1) billi jirrizulta mill-atti illi l-ammont ta' fuel li ittiehed mill-imputat kien

jeccedi l-elf lira maltin jew l-ammont ta' €2329.37.^{2 1}

The judgment was confirmed by the Court of Criminal Appeal³.

In the case in the names **'Il-Pulizija versus George Manicolo'**⁴ the Court considered:

“Illi l-ġurisprudenza nostrali dejjem kienet illi sabiex jissussisti r-reat ta' truffa mhix biżżejjed is-sempliċi gidba, il-kliem menzjonier, iżda hu neċessarju u essenzjali li jkun hemm ukoll l-apparat estern li jagħti fidi u kredibilita' lil dik il-gidba. Dan l-att estern jista' jiehu diversi forom, kultant anke att teatrali. Irid ikun att, jew atti, li jimpressjonaw bniedem ta' intelligenza u prudenza ordinarja u normali, għandhom ikunu atti frawdolenti li neċessarjament iqajmu sentimenti kif indikat fl-artikolu 308 tal-Kap. 9. Irrid ikun hemm il-messa in xena u għalhekk, kif intqal, il-gideb waħedhom mhumieq suffiċjenti. Iridu jkunu atti, inkluż kliem helu u perswassiv, li jwasslu lil xi hadd jemma l-eżistenza ta' xi haġa msemija mil-frodatur, liema haġa, in realta', ma teżistix. Minbarra l-gideb għalhekk, irid ikun hemm l-ingann, ir-raġġiri jew is-simulazzjoni li jwasslu sabiex il-vittma jemma jew ikollu fidi f' dak li qed jiġi lilu mwiegħed mill-frodatur. Dan l-ingann, għalhekk, għandu jkun akkumpanjat b'artifizji kwazi teatrali, u mhux semplicement wegħdiet, promessi u kliem sempliċi. Dan hu element ferm importanti fir-reat ta' frodi. Biex ikun hemm dawn l-artifizji, mhux biżżejjed il-kliem waħdu, iżda dan il-kliem għandu jkun elokwenti, studjat u perswassiv; ma' dan it-tip ta' kliem għandu jkun hemm xi haġa esterna li apparentement tikkonferma u tipprova l-fatti assenti, ċjoe' apparat estern li jirriċevti bi kredibilita' l-affermazzjoni menzjoniera tal-frodatur;

Din il-messa in xena hi magħmula minn dawn l-artifizji jew raġġiri idonei li jinduċu u fil-fatt ikunu induċew lill-vittma fi żball li bħala riżultat ta' dan l-iżball, il-vittma taġmel jew tonqos li taġmel xi haġa li gġibilha telf patrimonjali bil-korrispondent qligħ għall-aġent frodatur;

Kif ġie stabbilit u riaffermat fil-Qrati taġna, ikun hati ta' truffa minn jagħmel użu minn

² Ara total tad-Dokumenti MZ12, MZ13, MZ11, MZ10 u MZ9 li kollha jirreferu għal perijodu bejn Lulju u Settembru 2006 (This reference is found at footnote 8 of the quoted judgment)

³ Decided on 17th May, 2012 (Criminal Appeal Number: 139/2011)

⁴ Decided by the Court of Criminal Appeal on 31 July 1998

*kwalita' falza sabiex jagħmel qligh għad-dannu ta' haddieħor;*⁵

In the case in the names **'Il-Pulizija [Spettur Maurice Curmi] vs Anthony Fountain u Stephen k/a Steve Abela'**⁵ the Court considered:

'Illi d-differenza bejn r-reati ipotizzati f'l-artikoli 308 u 309 tal-Kodici Kriminali, kif ukoll l-elementi rikjesti biex jissussistu dawn ir-reati, hija ben stabbilita fil-gurisprudenza tagħna.

*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 ... jekk l-ingann jew qerq ikun jikkonsisti f'raggiri jew artifizji - 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)*⁶.

*Illi x'jikostitwixxi r-raggiri u l-artifizji ukoll huwa ben stabbilit fil-gurisprudenza tagħna. Fi kliem Antolisei*⁷

artificio e' ogni studiata trasfigurazione del vero, ogni camuffamento della realta effettuato sia simulando cio che non esiste, sia dissimulando ... cioe che esiste. Il raggio d'altra parte e un avvolgimento ingenuo di parole, destinate a convincere: piu precisamente una menzogna corredata da ragionamenti idonei a farla scambiare per verita. E certo che l'espressione del codice di per se' richiama l'idea di una certa astuzia o di un sottile accorgimento nel porre l'inganno in opera.

Antolisei jkompli jghid pero li

nell'applicazione pratica della legge questa idea e' andata sempre piu affievolendosi, fin quasi a scomparire del tutto. Per tal modo si e' finito con l'ammettere che anche la semplice

⁵ Decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 15th December 2011 (Number: 688/2009)

⁶ Ref Pulizija ve Carmela German AK deciza 30.12.2004 u l-gurisprudenza hemm kwotata. (This reference is found in footnote 7 of the quoted judgment)

⁷ Manuale Di Diritto Penale (Giuffre) pagna 356. (This reference is found at footnote 8 of the quoted judgment)

*menzogna puo bastare per dare vita alla truffa*⁸.

Illi f'dan is-sens anke l-Qorti ta' l-Appell Kriminali qalet hekk dwar il-messa in xena:

*Il-Ligi taghna ma tirrikjediex li l-messa in xena, cioe dawk l-artifizji jew raggiri, ikunu xi haga kkumplikata jew arkittetta b'hafna pjanijiet*⁹.

Illi fil-kaz in ezami jirrizulta li l-imputati verament kienu diretturi tas-socjeta Bahia Estates Limited liema socjeta verament kienet akkwistat propjeta biex tizvilluppaha f'binja gdida. Jirrizulta wkoll li fil-fatt din il-propjeta giet zvoilluppata bil-mod kif kellha tigi zvoilluppata. Huwa pacifiku li s-socjeta Bahia Estates Limited kellha diffikoltajiet biex tottjeni il-kancellamenti minghand l-APS Bank Limited biex tkun tista' tbiegh parti mill-binja zvoilluppata lill-parte civile. Pero huwa pacifiku ukoll li l-parte civile kienu jafu b'dawn id-diffikoltajiet u xorta baqghu iggeddu l-konvenju. F'dan il- kwadru ta' fatti ma tirrizulta l-ebda messa in xena, u lanqas ma jirrizulta xi ingann perpetrat da parti tas-socjeta Bahia Estates Limited li permezz tieghu induciet lill-parte civile biex jaghmlu l-pagamenti li fil-fatt ghamlu.

*Illi tenut kont ta' dan, fid-dawl tal-provi kollha prodotti, fil- fehma tal-Qorti r-reati kontemplati f'l-artikoli 308, 309 u 310(1)(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta lanqas ma gew pruvati.*¹

Article 308 and 309 of Chapter 9 of the Laws of Malta at the time when the alleged offences took place read as follows:

'308. Kull min, b' mezzi kontra l-ligi, jew billi jagħmel użu ta' ismijiet foloz, jew ta' kwalifiki foloz, jew billi jinqeda b'qerq ieħor, ingann, jew billi juri haġa b'oħra sabiex iġieghel titwemmen l-eżistenza ta' intrapriżi foloz, jew ta' hila, setgħa fuq haddieħor, jew ta' krediti immaginarji, jew sabiex iqanqal tama jew biża' dwar xi grajja kimerika, jagħmel qligħ bi

⁸ Op cit pagna 357 (This reference is found at footnote 8 of the quoted judgment)

⁹ Ref Pulizija vs Emanuel Ellul deciza 20.06.1997. (This reference is found at footnote 10 of the quoted judgment)

ħsara ta' ħaddieħor, jeħel, meta jinsab ħati, il-piena ta' prigunerija minn seba' xhur sa sentejn.

309. *Kull min, bi ħsara ta' ħaddieħor, jagħmel xi qligh iehor b'qerq, mhux imsemmi fl-artikoli ta' qabel ta' dan is-sub-titolu, jeħel, meta jinsab ħati, il-piena ta' prigunerija minn xahar sa sitt xhur jew il-multa.'*

The First Court in the appealed judgment considered that *'It clearly transpired that the accused never effectively gave any results for the services he had promised to deliver. In actual fact, the accused could never deliver on his promises because from the evidence produced in this case, it clearly transpired that the accused was only presenting a false scenario, a well elaborated scam to defraud the people who actually fell for the trap.'*

The agency contract between Dragon Co Ltd represented by Robert Tonna and the mandatary of Companyconsult represented by Peter Kováč as company's legal representative is found at foglio 53 et sequitur of the acts. According to this agreement found at fol 53 et sequitur *'the Mandatary obliges: to look up the most suitable business partners (a West-European, American or Canadian bank, institution or private investor) for the provision of commercial loans that can be regarded as intermediate loans or primary long-term loans; to assure the elaboration of business plans as joint-venture founding projects, projects for investment programmes, acquisitions, mergers - for the purpose of the Mandatary's intervention into global business.'*

The agreement in relation to terms of payment at foglio 54 of the acts provides that:

'1. The Mandatary's reward will amount to 5 % of each acquired loan and shall be paid to the Mandatary at the latest within 30 days from the date of the Mandatary acquires the demanded loan. This reward shall be paid in Slovak Crowns and transferred to the Mandatary's bank account.

2. The Client shall pay to the Mandatory a handling charge of 5,000 LM (equaling 0,50% of the required loan) - to a bank-account agreed and not later than with the signing of this Contract. The Mandatary is supposed to use this money for paying expenses directly related to the fulfilment of the contractual obligation. It is mainly banking charges related to the

provision of the loan, fees for accountant services, experts, auditors, legal consultants and the expenses of the Mandatary as e.g. accomodation, phone charges, telex/fac (incl. international transmissions) as well as other fees and charges occurring in the course of the Mandatary's contractual negotiations. The Mandatary shall account the charges (charged to the above account) to the Client each quarter.'

That the contract according to article 6 was concluded for a period of two months and had to become effective on the date of its signing by both Contracting Parties. The date of the agreement is the twenty eight (28th) of October of the year two thousand and three (2003). This 'agency contract' does not make reference to the requirement of an insurance policy. On the same day, an agreement was signed whereby Anastasious Constantin declared that he is accepting '*the some of 5,000 Maltese Liri given by Robert Tonna...*' This is found at fol 51. This Court notices that the passport number of the accused mentioned in that agreement does not reflect the passport number found in the photocopy at fol 152. At fol 52 another declaration is found whereby Constantin Anastasiou declared that he is receiving the first monthly payment 6,000 Maltese Liri equivalent to the daily exchange rate to euros for the insurance payment to '*prect Mr. Shodische MONTH 12-2003!*'¹⁰ This declaration is dated 23/11/2003.

The accused in his testimony dated nineteenth (19th) of October of the year two thousand and nine (2009) explained that the company Company Consult was an intermediary for banks and insurances. He was not a director of this company but to represent the company and make acquisitions for new clients. He was an intermediary, in the sense of a mandatary. He confirmed that he was authorised to sign agreements for this company. He knew the person representing Dragon company limited, Robert Tonna. Reference was made to fol 53 and explained that it is the contract to secure both interest and permissions as well as the situation about verification of documentation what the partner delivered. He confirmed his signature on every page and the signature of the other party. He explained that it was Robert Tonna that breached the agreement, explaining '*This I do not know because*

¹⁰ These words are not clearly legible.

we remind him even from abroad a couple of times but he was even arranged people from the insurances he would should have concluded the deal because the founding should be covered with insurance policy because obviously the property was mortgaged to another bank and we could not do it, we need to repay first the bank and then take the property as a collector real and an intermediate situation was arranged an insurance from Austria, but it was very interesting he knows weeks before that the person form insurance directly comes here. Because I was an intermediary, I was arranged from Austria the person. And he knows that this is to pay right, and there was an additional amount to pay and he was filing another report to the police. When the person from the insurance was here, . . . obviously because I was on the same time arrested when this insurance broker, not even the insurance broker, the contracting and the . . . was ready, was here in Malta. Obviously to the situation I lost the contract of the man, because he left, I do not know.' The accused states that Robert Tonna had to pay certain amounts to have a valid insurance but did not pay them so he was in breach of the contract. He explains that they could not have continued with the conditions of the agreement if he did not pay and he never paid. That he only paid an amount what is concerning the checking for documentation, he paid the initial amount for checking the documentation but did not pay the subsequent insurance amounts. The accused states that he did not get any money out of this.

So according to the accused, it was Robert Tonna that was in breach of the agreement. On the other hand, Robert Tonna on twenty second (22nd) of March of the year two thousand and four (2004) testified that the accused had told him that *'qed jislef il-flus li gejjin minn barra, jiena ma stajtix ingibhom mill-bank ghax bir-rati gholja u l-bank ried nofs u nofs, u jiena issellifthom, ghidtlu biex niehu hames mitt elef (Lm500,000) u qalli "Le", qalli "l-inqas miljun (LM1,000,000)", u jien ghidtlu "All right" mela, sewwa! Qalli li ridt inhallas hames elef lira (Lm5,000) biex jigbor xi karti, ir-ricerki fuqi u mhux fuqi, talabni xi karti u tajthomlu'*. Regarding payments, he explained that *'Jien tajtu kollox, hu, tal-kumpanija, tat-taxxa, kollox tajtu, li talabni fuq il-kuntratt tajthomlu kollha. Talabni hamest elef lira (Lm5,000), ghax qalli dawn iridu jghaddu "through Central Bank", se jirrangali kollox hu, kollox hu, u mbaghad talabni s-sitt elef lira (Lm6,000) li huma ta' l-"insurance", il-"first premium", u tajthomlu wkoll.'*

Regarding insurance, Robert Tonna stated '*Li qal hu li l-"insurance" se jgibhom mill-bank u ried jghaddihom lili "through Central Bank".'* He explained that '*Is-sitt elf lira (Lm6,000) ta' l-ewwel xahar tal-"premium", u mbaghad nibda inhallasom kull xahar, sitt elf, sitt elf.'* He received documentation in German from the accused who explained that '*Li qalli li hu sitt xhur, f'sitt gimghat ha jgibhomli u li rrid inhallas il-"premium", u kulma kien hemm xi ismi, kunjomi, l-"I.D. Card Number", il-"Passport Number" u affarijiet hekk.'* Asked whether he was asked for more payments, replied '*Iva, imbaghad qalli li jrid itini, irrid intih hmistax-il elf lira (Lm15,000) ohra. Ghidtlu "Dawn m'ghidtlx bihom jien". Qalli "Skuzani ghax issa indunajt bihom".'* He did not give him this amount. Regarding the loan and insurance, he explained that '*Ghax jien qatt ma gabli xejn, hu. La gabli mill-banek ta' barra li hu hallas il-hamest elf lira (Lm5,000) jew is-sitt elf lira (Lm6,000), xejn. Dejjem nitlobhomlu u qatt ma tahomli.'* He confirmed that he had given the account number, stating '*Tajtulu jien, iffeksajtulu d-dar.'*

Considers further;

That it results that even though the accused states that it was Robert Tonna that breached the agreement, while the prosecution managed to prove that Robert Tonna on behalf of Dragon Company Limited paid LM5,000 and LM6,000 to the accused, therefore LM11,000 in total, the accused did not bring forward any evidence confirming for what these monies were in reality used.

The appellant in his appeal with regard to Robert Tonna and Dragon Co. Ltd among other submissions stated that contrary to what the First Court might have considered and concluded shows that there was an unequivocal understanding set in the agreement that the loan would be processed and considered upon the second party Robert Tonna fulfilling the completion of a regular insurance policy. He also submits that the agreement was stalled by the accused being arrested and that it was the Police that spoke to Robert Tonna and that Robert Tonna did not file a report with the Police. The Court considers that irrespective of whether a report was filed by Robert Tonna, the Court is to consider whether from the evidence produced it results that the accused is guilty under article 308 of Chapter 9 of the Laws of Malta.

Furthermore, it is not up to this Court to decide whether a contract was breach from either parties but to decide whether from the evidence produced, the accused could legally be found guilty of fraud under article 308 or 309 of Chapter 9 of the Laws of Malta.

In document 9 exhibited by PS498 David Agius being documents found on the Computer systems seized from the accused, specifically from 'Computer System No 1' a document marked by PS498 David Agius as 'APPENDIX PC1-E' was found on one of the computer systems seized from the residence of the accused. This is a letter addressed to Robert Tonna Dragon Company Ltd allegedly sent from Mr Peter Kovac giving a final explanation. There is no signature on this document apart from the name of Peter Kocac and it does not result clearly whether this letter was in actual fact prepared by Peter Kováč or whether this was made up by the accused since it was found on one of the computer systems seized from the accused.

It also results that from Computer System 2 also seized from the accused, PS498 David Agius found what he describes in his report as '*A number of text strings were found within file lack and unallocated space.*' The Court noticed that parts of the letter marked as APPENDIX PC1-E was found on the hard disk drive. This therefore signifies that the accused might have been the person drafting the letter supposedly sent by Peter Kováč. However it does not result whether this was given to Robert Tonna or Dragon Company Limited.

Marked as APPENDIX PC1-M and APPENDIX PC1-N also found on one of the Computer systems seized from the accused are loan agreements between Dragon Company Limited and FORTIS FUND LTD in 'Nassau Bahams' as trustee. These loan agreements are not identical and are not signed. A loan agreement between Dragon Company Limited and FORTIS FUND LTD was also found on a floppy disk. This document is marked as APPENDIX DK-E. These raise several suspicions about the veracity or otherwise of the role of the accused in the agreement with Dragon Company Limited, and questions as to why these were found on the computer system seized from the accused are raised. Whether it was the accused himself who

was drafting these loan agreements, whether he had the authority to draft such loan agreements or whether he was giving the impression that third parties were drafting these agreements. However, as considered it does not result whether these loan agreements were signed by Robert Tonna in representation of Dragon Company Limited. What results to have been signed is the agency contract at fol 53 et sequitur.

As considered, for this charge to subsist, the prosecution must prove that the agent must have used the means mentioned in article 308 of Chapter 9 of the Laws of Malta such as an unlawful practice, by means of any fictitious name, or the assumption of any false designation or by means of any other deceit, device or pretence. That the agent's action must have led the victim to part with an object or to do something, that there must be the intention of defrauding another with the intention of making an unjust gain and that an actual unjust gain must have actually been made. In this case, it results that Robert Tonna paid LM5000 and LM6000 but he never received documentation justifying for what these monies were actually used. In criminal cases, it is the prosecution that has to prove the case beyond reasonable doubt. While the defence does not need to prove anything but if it decides to prove something, it is enough that it is proven on a balance of probability. This Court considers that the Prosecution did not manage to prove beyond reasonable doubt that the accused used a fictitious name or the assumption of any false designation, or that he lead to the belief in the existence of any fictitious enterprise. Even though there are a number of suspicions around the agreement in question and about documents found computer systems and floppy disks seized from the accused, suspicions are not enough in criminal proceedings to find guilt. Furthermore, even though it results that the accused did not deliver what he promised, this however does not mean that the accused committed fraud.

The prosecution was expected to bring forward evidence about the lack of existence or otherwise of 'CompanyConsult' and of the persons mentioned in the 'agency contract' in question. It had to prove that the accused had nothing to do with

this Company, that he was not authorised to act as mandatary on behalf of this Company.

At fol 172 an extract of Business Register of District Court Bratislava was exhibited where the partners on thirteenth (30th) July of the year two thousand and three (2003) were Peter Kováč and Dieter Fishcer. Peter Kováč is also indicated as the Executive Director according to this extract. It results that Peter Kováč is indicated as the company's legal representative on the agency contract with Dragon Co Ltd. This does not mean that the agreement and details contained in the agreement are legitimate. The Prosecution had to bring evidence confirming that the accused was not authorised to act as mandatary of Companyconsult. It is not enough for the prosecution to present documentation such as the extract of Business register of District Court Bratislava to prove who the members making part of the Company are but had to prove that the accused had no connection with such a company and could not act as a mandatary or intermediary. This had to be done through the testimony of a representative from Company consult confirming or otherwise their relationship with the accused. Once this is established, the Prosecution had to then prove the intention to defraud but it had to first prove that what the accused made others believe he was, was not true. The Court therefore finds that the Prosecution did not manage to prove the case beyond reasonable doubt. It is therefore revoking guilt of the first (1st) charge.

The Court did not find guilt of the third (3rd) charge, that is of misappropriation on the basis that it regarded it as an alternative to the first (1st) charge. The Attorney General did not appeal from the judgment and therefore the Court cannot find guilt of this charge. The Court however underlines that the prosecution managed to prove that LM11,000 in total was given to the accused by Robert Tonna on behalf of Dragon Co Limited and that there is no evidence that the amounts were in actual fact used for the purpose the amounts were given to the accused. That there is no evidence that the accused delivered what he promised. Therefore the accused might

be guilty of the charge of misappropriation if after the prosecution proves that amounts of money were given for a particular purpose and were not used for the purpose they were given and the accused on the other hand does not prove on a balance of probabilities that the money was used for the purpose it was given to him. However as considered, in view that the First Court abstained from taking cognisance of the third (3rd) charge and since no appeal was filed by the Attorney General in this respect, the Court at this stage cannot find guilt of misappropriation.

Considers;

With regarding to the second (2nd) charge concerning fraud to the detriment of Vanir Co. Ltd and Joseph Schembri, Joseph Schembri testified on the twenty second (22nd) of March of the year two thousand and four (2004) that he is the managing director of his own company 'Valerio Company Limited'. He testified that he was having business dealings with him in return for a bank guarantee, it was a business dealing where he offered 25% shareholding in the company for a bank guarantee on 1.2 million euros. Asked if he got the guarantee replied '*As yet no*'. He paid approximately LM2, 800 for the bank guarantee. He explained that it was '*a point zero five per cent (0.05%) of the charges basically, and another point zero five per cent (0.05%) as soon as the guarantee is issued.*' Asked if the guarantee was issued replied '*As yet no. Last week, no, two weeks ago a certain Yousef - I don't remember his surname - Smutlef, something - came from one of his companies abroad, we had a meeting with my bank manager Bertu Pace from Zejtun Branch, BOV. Basically the meeting entailed coverage of insurance, a life policy for me in their name which he agreed with the bank it could be one of the conditions on the guarantee and also that the bank itself will take care of it. I was supposed to meet with Tino two days later, on Friday, basically to fax all necessary documents and a draft of the contract to the company abroad, and Friday afterwards I couldn't contact him as he was arrested.*' Asked if he received any of the LM2,800 replied '*I had, a couple of weeks ago I had a problem with my cash flow, because I mean at this time of year my business is practically nil, so it's more of preparation for the following summer. I asked him, I told him basically that I had a problem with cash flow and he gave me two thousand Euros, the equivalent of eight hundred pounds (Lm800).*' They started in the

beginning of December and was supposed to be ready by the end of the year but he had problems abroad and was extended verbally between them from week to week.

He explained that *'As yet, as yet the guarantee hasn't come. Two weeks ago a person came from abroad, Josef Schmutlack I think his surname is, from Company Consult, as I said, we had a meeting with the bank manager, it was the day before you called me to your office. We had a meeting with Bertu Pace of Zejtun Branch to finalise what the bank needed for the bank guarantee, and also because one of the things that wasn't mentioned before was an insurance policy, my own personal insurance policy which the company wanted, Company Consult wanted to issued the bank guarantee, and we agreed with the bank manager that it could be one of the conditions set by the company abroad in the bank to bank guarantee, and the bank BOV itself would take care of it.'* He did not purchase the insurance since it had to be one of the conditions of the guarantee. That *'so basically the guarantee arrived and one of the conditions in the guarantee will be that I would have a life policy for the amount.'*

The witness stated that his lawyer drafted a contract which they signed together. He did not receive any paperwork from any institution. When the accused Costantin Alexander Anastasio testified on nineteenth (19th) October of the year two thousand and nine (2009) he explained that he got to know Joseph Schembri through Dunstan Williams. Joseph Schembri wanted *'To release, lease and refinancing for a touristic acquisition for a ship, for a boat.'* He confirmed that he had the power to sign the agreement and as a mandatory, that he gave a copy of the agreement to the police. The amount of Joseph Schembri was repaid *'because I could not do or conclude this work and I told him that I cannot do this and for the services there was nothing to re pay but I as a gentleman the agreement was doing this. Yes. Because he signed something that this was not refundable, funds for . . . but it is normal, even if you go to a lawyer, you pay for entering the money. You cannot say if you do not concluded on the Court, the funds is to re pay...'*

The Court notes that the agreement between Joseph Schembri or Vanir Co. Ltd and the accused was not filed in the acts of the proceedings. The appellant in his appeal in relation to Joseph Schembri of Vanir Co Ltd submitted that the charges were not proven in terms of the law. That the relationship between Joseph Schembri and the

appellant was in reality rather different than that of Robert Tonna as he was not strictly a client and the accused had not even entered into an agency or mandatory agreement. The defence submits that the appellant and Joseph Schembri were actually in business together in various commercial activities. That there was no complaint by Mr Schembri, hence the necessary element for the charges to constitute fraud in terms of the articles of the charge do not exist. Schembri did not deem the amounts advanced ever to be taken illicitly by the accused.

The appellant submits that Joseph Schembri confirmed on oath that he was reimbursed an amount and was loaned the remainder. He submits that the charge could not have ever materialised as Joseph Schembri willingly paid what he paid and the appellant actually reimbursed what Mr Schembri requested. There was absolute trust between them and no deceit can be attested by the evidence in the acts. That he confirmed that a meeting at BOV Zejtun ensued and this shows that all dealings were above board, real and concrete as no bank manager would entertain such an application had they not shown that parties were proceeding in a correct commercial behaviour. That the First Court unjustly failed to appreciate the real state of affairs. That his arrest and denial to be granted bail for a prolonged period of time was illegal and unjust and resulted in disrupting his otherwise commercial activity as a businessman.

The Court considers that from the testimony of Joseph Schembri it results that the accused gave back LM800. There is no evidence that he refunded the rest of the amounts but that 2000 euros was loaned back to Schembri. The First Court in the appealed judgment considered that *'Further police investigations revealed that something very similar happened to Mr. Joseph Schembri (who also testified in Court) who operated a tourist holiday service business. Mr. Schembri wanted to buy a boat for his business and the accused happened to appear in the picture (around December 2003) and offered to provide him with a bank guarantee for the amount of €1,200, 000. As an initial payment, the accused managed to acquire the sum of Lm2,800 from Mr. Schembri. Out of this amount, Mr. Schembri managed to recuperate Lm800 from the accused.'*

*It clearly transpired that the accused never effectively gave any results for the services he had promised to deliver. In actual fact, the accused could never deliver on his promises because from the evidence produced in this case, it clearly transpired that the accused was only presenting a false scenario, a well elaborated scam to **defraud** the people who actually fell for the trap.'*

The Court considers that the fact that the accused never effectively gave any results for the services he promised does not necessarily mean that the accused defrauded Joseph Schembri or Vanir Co. Ltd. According to Joseph Schembri, a meeting was held at the Zejtun Bank of Valletta branch with a person from Company Consult. The Court considers that the Prosecution had to prove that Company Consult does not exist, or that the accused had no connection with Company Consult or was not authorised to act on behalf of Company Consult. It is not sufficient to simply prove that the bank guarantee had not been issued. The Court is therefore not satisfied that the prosecution managed to prove the elements of the offence under article 308 or article 309 of Chapter 9 of the Laws of Malta in relation of the alleged victims Vanir Co. Ltd and Mr. Joseph Schembri. The Court is therefore revoking guilt of the second (2nd) charge.

Considers;

The accused was also found guilty of the fifth (5th), sixth (6th) and seventh (7th) charge. These provide:

'5. also, for having during the same period, knowingly committed forgery of any authentic and public instrument or of any commercial document or private bank document, by counterfeiting or altering the writing or signature, by feigning any fictitious agreement, disposition, obligation or discharge, or by the insertion of any such agreement, disposition, obligation or discharge in any of the said instruments or documents, after the formation thereof, or by any addition or alteration of any clause, declaration or fact which such instruments or documents were intended to contain, or prove and this in breach of Sec. 18 and 183 of Chapter 9 of the Laws of Malta;

6. for having, during the same period, knowingly made use of any of the false acts, writings, instruments or documents, and this in breach of Sec. 18 and 184 of Chapter 9 of the Laws of Malta;

7. also, for having, during the same period, knowingly committed any other kind of forgery, or shall knowingly made use of any other forged document, and this in breach of Sec. 18 and 189 of Chapter 9 of the Laws of Malta;'

The accused did not raise an ad hoc ground of appeal regarding these charges however requested that the Court reviews and revokes the decision where the Court also found guilt of this articles and to find the accused not guilty of the charges brought against him since the Prosecution failed to produce evidence that proves the charges.

The Court in the appealed judgment considered that '*upon an examination of the documents seized from the possession of the accused and exhibited in these proceedings this Court has no doubt in declaring that the prosecution managed to prove its case according to law against the accused with respect to the (5), (6) and (7) charges as proffered.*' The First Court did not specifically indicate which documents it is referring to but this Court understands that the documents in question are found at fol 26 captioned 'Specimen Bank Guarantee' marked as Dok 1, fol 27 is the document with the signature cut out, fol 28 has a signature of Palle Stevens glued to the document, fol 29 which is a photocopied or scanned document while fol 31 and 32 have the signature of Palle Stevens glued. The document at fol 28 regards a letter dated 23rd February 2004 allegedly from Steven Palle to Mr. Peter Bulik and CC'd is Mr. C. Anastasiou World Star International. Fol 30 is an urgent reminder allegedly from Mr. Palle Stevens to Mr. Mikulas Seman and CC. Eng. Mr. Peter Kovac.

In Dok. 9 exhibited by PS498 David Agius found on one of the computer systems seized from the accused is document named 'FAX' marked as APPENDIX PC1-G with the date second (2nd) March of the year two thousand and four (2004) addressed to Palle Stevens from Costantin Anastasiou, the following results:

'Dear Mr. Palle Steven,

We are very sorry for the misunderstanding of the Fax transfer made to you. You are quite right that it is nothing to do with you, that fax was sent from me and how your name got there is a mystery. As you know you are in our computer system, and the only thing I can think your name must have come up whilst she was preparing a document. I apologise for this big mistake. Thank you for your immediate attention. I can assure you this will not take place again.

Best Regards,

Constantin Anastasiou.'

However, it is not clear what document the accused is referring to. Whether it is one of the altered documents presented in the acts of the proceedings. The Court also notes that from the findings in the report of PS 498 David Agius from emails sent from the account 'Pretoria@maltanet.net' to 'companyconsult@cetrum.sk', the sender at the end of the email is indicated as 'Palle Stevens' or 'S. Palle' even though next to 'Pretoria@maltanet.net' the word "tino" is found. The Court underlines that the testimony of Palle Stevens, if such a person exists was crucial in this case to determine whether these emails were sent by him or whether he authorised the accused to send such emails in his name. These emails are marked as APPENDIX P1-MAIL01, APPENDIX P1-MAIL02, APPENDIX P1-MAIL03 and APPENDIX P1-MAIL04.

Furthermore at folio 34 marked as Dok 2 a transaction advice of HSBC addressed to 'THE PROMOTERS SPQR CO LTD' has parts of it corrected in biro. A photocopy in colour of this altered document is found at fol 35. While at fol 36 a document which appears to be faxed since it contains at the top '23/10 03 12:59 Fax _421 2 59340540 Hotel DANUBE' has the same information which was altered in the previous document which gives the impression that the details altered in the previous documents were incorporated in this document to give the impression that it is legitimate.

The accused in his testimony in cross-examination was referred to fol 26 till 33, the accused confirmed that the police found a document which had the signature cut from it. Asked why was this happened replied '*. . . . documentation, the companies were for . . . two thousand three (2003) or something.*' Asked how did they end up next to his computer on his desk, replied '*Was making this company a statement against me. What is the way to do this case. I do not think so. Then I will ask me this.*' Asked '*So that was your son who did that.*' replied '*Yes.*' The replies given by the accused in cross-examination in this regard are unclear.

Inspector Paul Vassallo in the sitting dated twenty second (22nd) of March of the year two thousand and four (2004) testified that they performed a search at the residence of Mr. Anastasiou and that '*While we were at the premises we seized a number of documents which were relevant to our investigation which I'm going to exhibit to the Court in due course. Namely these were linked to the investigation at hand. What we found was documents to a company "Worldstar Intermediary Services", to a company called "Worldstar Intermediary Services Limited" When we looked at the persons involved in "Worldstar Limited" we do not find the name of Mr. Anastasiou, nor do we find the name of a certain Mr. Palle Stevens. What annoyed, rather not annoyed us, what caught our attention was the fact that these documents that I'm going to exhibit were next to a fax machine, they were being faxed off, but the signature of Palle Stevens was cut out, it was a photocopy that was attached to the document near the fax machine. And you'll note that there are other documents where the signature has been cut out and to different persons under different formats. Mr. Stevens here is listed as a Director, it's written as if in Italian, "Director di Economics", pero' Mr. Stevens does not appear on the directors list of this company.*' These documents were marked globally as Document Number 1. The Inspector testified that '*in the same file of papers that were near the fax machine we found an HSBC document, an HSBC statement, an HSBC electronic statement that is sent to account holders occasionally where this document has had alterations made to it in biro.*' There were three (3) documents, two (2) were in colour and one (1) is in black and white. He explained that the top cover was the original statement which had a number altered, the second appears to have come of a fax machine because it has

been copied or scanned because there's a line through the paper, and the third copy, which has no alterations to it, but carries all the facts that were altered and top copied, and was sent from a hotel to Mr. Anastasiou it appears. The sum appears to have been from five hundred Maltese Liri (LM500) to seven thousand five hundred Maltese Liri (LM7,500) or Euros, because then there's also where the denomination is on the document as Mtl., Maltese Liri, there's also behind this sign EUR, which is the denominator for EUROS. The documents regarding HSBC are marked as Document Number 2.

Inspector Ian Abdilla on 14th of April 2005 testified that '*a search was carried out at the residence of Mr. Costantino Anastasiou situated at Casa san Frangisk, Church Street, Wardija. Various documents and various computer equipment were seized in particular we found documents pertaining to a certain Wordstar Intermediaries Services. We also found documents which had the signature of a Mr. Pale Stevens which signature had been cut off and glued to other documents. We have also discovered HSBC documents which had been altered and also we found certain links with a certain company by the name of Selective Investments Limited. I am in a position to confirm that the documents which have been presented by Inspector Paul Vassallo which are marked as document 1 which are found at folio 33 et sequitur, these documents have been found by myself and Inspector Vassallo together with our officers through out this search. I have to make note that document a folio 28 refer to the documents which have the signature of Pale Stevens attached or glued on these documents. There is also in page 31 and page 32 of the same document. I am also recognising document 2 which is made up of three pages from fol 34 to fol 36 which are documents pertaining to HSBC Malta Limited whereby there is an adjustment in the amount of the deposit whereby it is shown that instead of one thousand five hundred or five hundred Maltese Liri, there had been a deposit of seven thousand five hundred Euros. Again this documents were found in the residence of Costantino Anastasiou.*'

The Court found guilt under articles 183, 184 and 189. These at the time of the alleged offence provided:

'183. Kull persuna oħra li taġmel falsifikazzjoni f'att awtentiku u pubbliku, jew fi skrittura kummerċjali jew ta' bank privat, b'falsifikazzjoni jew b'tibdil fl-iskrittura jew fil-firem, billi

toħloq pattijiet, disposizzjonijiet jew obbligi foloz jew ħelsien falz minn obbligi, jew billi ddaħħal dawn il-pattijiet, disposizzjonijiet, obbligi jew ħelsien minn obbligi f'dawk l-atti jew skritturi wara li jkunu ġew iffurmati, inkella billi żżid jew tbiddel klawnsoli, dikjarazzjonijiet jew fatti, illi dawk l-atti jew skritturi kellhom ikollhom fihom jew kellhom jippruvaw, teħel, meta tinsab ħatja, il- piena ta' priġunerija minn tlettax-il xahar sa erba' snin, bir- reklużjoni jew mingħajrha.

184. *Kull persuna li xjentement tagħmel użu minn att, kitba jew skrittura falza msemmija fl-artikoli ta' qabel ta' dan is-sub-titolu, teħel, meta tinsab ħatja, il-piena stabbilita għall-awtur tal-falsifikazzjoni.'*

'189. *Kull min jagħmel falsifikazzjoni ohra jew xjentement jagħmel użu minn xi dokument ieħor falsifikat, mhux imsemmija fl-artikoli ta' qabel ta' dan it-Titolu, jeħel il-piena ta' priġunerija għal żmien mhux iżjed minn sitt xhur, u jekk ikun ufficjal jew impjegat pubbliku b'abbuż tal-kariga jew impieg tiegħu, il-piena tkun ta' priġunerija minn seba' xhur sa sena.'*

As stated earlier on in this judgment, the Court will not be considering the statement released by the accused and to any reference made by witnesses to what the accused stated during the investigation and during the interrogation without the presence of a lawyer, so it will rely on the remainder on the evidence produced. The Court deems the accused as not credible when giving the impression during his testimony that it was his son who cut and pasted signatures on the documents. However even though in view that the documents were found in the residence of the accused, there is ample suspicion that it was the accused who altered such documents also in view that the HSBC transaction advice regards 'SPQR Ltd' which the accused in his testimony stated that it is his company, the Prosecution however for instance in the case of the altered HSBC transaction advice, failed to summon an HSBC representative to confirm that the alterations did not take place by a representative of HSBC. Even though the Court deems the documents with glued signatures as highly suspicious, the Prosecution also failed to summon a representative from Worldstar Intermediary Services Ltd to testify whether Steven or Stevens Palle was a director of the company or whether he had any role. Furthermore, the fact that these

documents were found in the residence of the accused is not enough for the level of proof required in criminal proceedings to prove that it was the accused who altered such documents and that he made use of them.

The Court therefore considers that even though there are a number of suspicions around the behaviour of the accused and the fact that these documents were found in his residence, the Prosecution failed to reach the level of proof required in criminal proceedings, that beyond reasonable doubt that it was the accused that falsified such documents and that he made use of such documents. The Court is therefore also revoking guilt of the fifth (5th), sixth (6th) and seventh (7th) charges.

The Court also draws the attention to the fact that although the alledged offences took place in the year 2004, the judgment delivered by the first Court of Magistrates as a Court of Criminal Judicature was given on the 7th March 2018. This appeal has been pending before this court as composed only since July, 2019 and during this latter period time the defence had asked for a number of adjounments.

Therefore, the Court concludes by upholding this appeal for the reasons considered in this judgment and while confirming where the Court in the appealed judgment abstained from taking cognisance of charges (3) and (4), revokes where it found guilt of the first (1st), second (2nd), fifth (5th), sixth (6th) and seventh (7th) charges and therefore acquits the accused from all guilt and punishment.

The Court underlines that since punishment is being revoked in its entirety in view that guilt of the charges brought against the accused is not being found, the Court is also revoking where the First Court in the appealed judgment in terms of article 28H of the Criminal Code ordered the accused to return to the injured parties Robert Tonna and Joseph Schembri the sums of €25,623 and €4659 respectively equivalent to LM11,000 and LM2,000 within four (4) months. The Court however makes it clear that Robert Tonna, Dragon Co. Limited and Joseph

Schembri and Vanir Co. Limited retain their right to proceed civilly against the accused to recuperate amounts paid to the accused.

(ft) Consuelo Scerri Herrera

Judge

VERA KOPJA

Franklin Calleja

Deputat Registratur