



**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

**Magistrate Dr. Joseph Mifsud B.A. (Legal & Int. Rel.),
B.A. (Hons), M.A. (European), LL.D.**

The Police

(Inspector Matthew Grech)

vs

Mamadou Diong

Case number: 493/2020

Today 21st December 2020

The Court;

Having seen the charges against Mamadou Diong, born in Nioro Du Rip, Senegal on the twenty second (22) of October of the year one thousand nine hundred and ninety (1990), without fixed address, holder of Italian Identity Card CA67495EH and Italian residence permit number 114464456, charged with having on the 23rd September 2020 at 21:00hrs in Dragunara Road, St. Julian's:

1. With the intent to commit a crime of theft at the detriment of Abdulrahman Mustafa Elhasuni from Sliema, manifested such intent

by over acts and commenced the execution of the crime which was not completed in consequence of some accidental cause independent of his will which theft if completed would have been aggravated with 'violence', 'amount' and 'time'.

Also for having on the 23rd September 2020 and the months before in the Maltese islands:

2. Lead an idle and vagrant life.

This Honourable court is humbly being requested to apply Section 533(1) of Chapter 9 of the Laws of Malta, as regards to the expenses incurred by the Court for appointing Experts.

Having seen Articles 41(a), 261(a)(c)(f), 262(1)(b), 267, 270, 280(2) and 338(w) of Chapter 9 of the Laws of Malta;

Having seen the Note of Submissions by the Prosecution presented on the 10th December 2020 and the Note of Submissions presented by Mamadou Diong on the 15th December 2020;

Having seen the documents exhibited and all the acts of the proceedings;

Witnesses

In these proceedings the Court heard seven (7) witnesses as follows:

Abdulrahman Mustafa Elhasuni (*a fol 24 et. seq.*); PS 430 Andrew St. John (*a fol 28 et. seq.*); Inspector Matthew Grech (*a fol 34 et. seq.*); PC 1442 Kevin Spiteri (*a fol 45 et. seq.*); PC 1113 Ramsis Tonna (*a fol 47 et. seq.*); Joseph Grech (*a fol 49 et. seq.*); Jonathan Mizzi (*a fol 52 et. seq.*).

The facts

On the 25th September 2020, Mamadou Diong was arraigned under arrest and accused with the attempted aggravated theft at the detriment of Abdulrahman Mustafa Elhasuni and also for having lead an idle and vagrant life;

Evidence brought by the prosecution and the testimony of the parte civile Abdulrahman Mustafa Elhasuni, have all mentioned the fact that the parte civile was agitated, went inside the Golden Tulip Vivaldi Hotel asking for help and there was in actual fact Mamadou Diong present outside the Hotel waiting outside, and going after him;

All witnesses of the prosecution have identified the accused, as the person indicated including the police on site, RIU officers, and the Hotel's security;

CCTV Footage and stills show that the parte civile entered Vivaldi Hotel in an agitated manner and was even looking behind his back, pointing to the accused and gesticulating to the accused already outside of Golden Tulip Vivaldi Hotel;

The accused did not tender any evidence in this case, as he holds that the prosecution did not prove its case beyond a reasonable doubt for a number of reasons and mentions that¹:

1. **From the outset and all throughout proceedings, the accused, who is presumed innocent, always proclaimed his innocence.**

- i. As per the Police Report of the 23rd September 2020, at page 10 of the Court File, 6th paragraph, last line, the following was noted:

*He [the accused] had been previously given his rights by same PS. 430, however **without being directly asked anything in relation with the case, he categorically denied his involvement.***²

- ii. In his statement, given on the 25th September 2020 he stated:

That is not true I never tried to rob anyone in my life (pg. 17, 10th line).

On being asked:

Am I right by saying that you desperately need money and you tried to rob this man? (pg. 17, 8th line from the bottom)

The accused replies:

No that is not true. If I need money I don't go to this man to get money (pg. 17, 7th line from the bottom).

The accused indicated that he lived in Sliema; **if he wanted to rob someone would he have needed to go all the way to St. Julian's to do so? Would he not have found someone on the way from Sliema to St. Julian's? Did he have to specifically target the parte civile?**

¹ Note of Submissions presented by Mamadou Diong on the 15th December 2020;

² Emphasis added by the accused – parts in bold throughout this Note of Submissions are for emphasis.

- iii. The Rapid Intervention Unit (RIU), namely PC 1442 Kevin Spiteri, officer who testified in the sitting of the 18th November 2020, indicated that **the accused was co-operative**:

*So we went on him and told him to come and sit down. But he was ok and complying with us.*³

PC 1442 upon cross-examination further added:

*He did not cause any trouble with us.*⁴

Would it be logical for the accused, if he was truly involved in the attempted aggravated theft to remain on site and not try to flee?

- iv. Inspector Grech during the sitting of the 18th November 2020 testified that **the accused denied that with someone else he tried to mug Elhasuni** (pg 35 of the Court File – 6th and 7th line). PC 1442 Kevin Spiteri also indicated that **the accused wanted to file a police report against the alleged victim of this alleged aggravated theft** (pg 45 of the Court File – 6th /7th line from bottom). This was also confirmed by the testimony given by PC 1113 Ramsis Tonna on the 18th November 2020 (Pg 47 of the Court File – 9th line from beginning of questioning).

Having Considered:

The principle regarding the "burden of proof" is one that he who alleges something has to prove it. In fact reference can be made to what Manzini states in his book entitled *Diritto Penale*:

"il cosi detto onere della prova cioe' il carico di fornire la prova spetta a chi accusa," (onus probandi incumbit qui asserit).

³ Pg 45 of the Court File - 8th and 9th line;

⁴ Pg 46 of the Court File – 3rd and 4th line.

Thus, the result is one that in criminal cases the onus of proof rests on the prosecution during the whole case and it is only by exception that the accused is to dispute anything for example the defence of insanity. However, in this case the accused did not rest solely on the evidence brought forward by the prosecution but also offered a Note of Submissions to dispute what was being alleged in his regard.

In such a case and in such circumstances the presiding magistrate ought to apply good sense in that such adjudicator ought to be morally convinced of such facts as attempted to be reached and proved by the prosecution.

In the case at point the only witness who alleges the attempted theft is the parte civile who explains what had actually occurred.

Whereby article 637(2) of the Criminal Code provides for the credibility of the witness which has to be left in the discretion of those judging facts by taking into consideration the character and conduct of the witness.

It has been held by this Court in the Criminal Appeal: "**Il-Pulizija vs. Joseph Thorne**" [9.7.2003] that not every conflict of evidence should automatically lead to the acquittal of the accused. But the Court, in cases where the evidence is conflicting, should evaluate the evidence according to the criteria laid down in article 637 of the Criminal Code and then reach its conclusion as to whom it should believe or not believe and whether it should believe him wholly or in part or not at all.

The obligation to prove guilt of an accused person is absolute and this on a level beyond reasonable doubt and should there be any doubt this would mean that the prosecution did not prove its case beyond reasonable doubt. And therefore the Court would have to acquit the accused.

With regards to the second charge brought against him, ie: the violation of Article 338(w) of Chapter 9, as testified by Inspector Matthew Grech, while Mr. Diong was being interrogated he stated that he was homeless and had currently been living under a bridge in Sliema.

Therefore, based on this evidence the accused Mamadou Diong is being found guilty of the second charge brought against him.

DECIDE

The Court after having seen all the evidence produced in this case decides that the first charge brought against the accused has not been sufficiently proven and, for the reasons mentioned above, the Court is acquitting the accused from the first charge brought against him and after having seen Article 338(w) of Chapter 9 the accused is being found guilty of the second charge and condemns him to one month of detention.

Dr. Joseph Mifsud
Magistrate